In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1124

UNITED STATES

v.

W. M. WEBB, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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DOCKET ENTRIES

(W. M. Webb, Inc., et al. v. United States, No. 15170)

Date	Proceedings	Date Order or Judgment Noted	
2/17/64	Flg. complaint. Issg. 4 summons.		1
2/31/64	Flg. M. R. on summons (Serv. U. S. A. thru Attorney Gen. via certified mail on 12/26/64; thru U. S. Attorney in person on 12/22/64; thur Internal Revenue Bureau via Agt. Sabathien on 12/22/64.)		2
2/10/65	Flg. motion of Deft. to drop parties plaintiff, Carteret, Inc., and C. P. Dey, Inc.; notice of hearing on 2/17/65; memo in support.		3
2/16/65	Flg. joint motion of parties and ORDER CONTINUING hearing on Deft.'s motion to drop parties Pltf. from 2/17/65 to 3/3/65. Ent. 2/17/65. Issg. notice		4
2/26/65	Flg. ANSWER by Deft.		5
2/26/65	Flg. joint motion of parties and ORDER dated 3/3/65, continuing Deft's. motion to drop parties to 3/10/65. Ent. 3/3/65. Issg. ntc.		6
3/10/65	Hearing and ORDER that the motion of Deft. United States of America, to drop as parties Pltf., Carteret, Inc., and C. P. Dey, Inc. be DENIED without prejudice to the right of Deft. to		

	re-new said motion at a later date. Ent. 3/12/65. Issg. ntc.	7
3/26/65	Flg. interrogs. propounded to Pltfs. by Deft.	8
6/ 7/65	Flg. Answers to interrogs. by Pltfs.	9
12/ 1/65	Flg. TRIAL REQUEST by Pltf.	10
2/11/66	Flg. request for admission of facts propounded to deft. by pltfs.	11
3/ 3/66	Flg. opposition to motion of Deft. to extend time by Pltf.	12
4/18/66	Flg. stipulation of parties for an extension of time of 90 days within which to file pleadings.	13
4/19/66	Flg. stipulation of parties and ORDER granting Deft. an extension of time of 90 days time within which to file pleadings. Ent. 4/19/66. Issg. notice.	14
8/ 5/66	Flg. notice of taking depositions of W. M. Webb, Inc., appearing by Jack T. Styron, Carteret, Inc., appearing by Jack T. Styron and C. P. Dey, Inc., appearing by Jack T. Styron by Deft. on 8/25/66.	15
9/ 9/66	Flg. Deft's. Answer to request for admission of facts.	16
/23/66	Flg. deposition of Jack T. Styron.	X
1/13/67	Issuing Notice to Attend Pre Trial Conference on 3/23/67. Ent. 2/21/67	17
3/16/67	Flg. Motion by Plaintiff for an order that pltf's request for admissions of fact be deemed admitted by defendant.	

Memorandum in support of motion. Notice of Hearing, 3/23/67. Ent. 3/16/67. 18

3/14/67 Flg. Notice by defendant to take deposition of James Fullwood, W. G. Oglesby and Hiram Hankins on 4/3/67. 17-A

3/23/67 Flg. Joint Motions by parties to consolidate and ORDER that C.A. 15170, 15171, 15172 15215 and 15216 be Consolidated for trial and that jury demand be withdrawn. (F.J.C.) Ent. 3/27/67. Issg. notice. 19

3/23/67 Pre-Trial ORDER. Trial date set for May 17, 1967. Non-jury. (F.J.C. 3/23/67) Schedule "A" to Pre-Trial Order. Ent. 3/28/67. Issg. notice. 20

4/24/67 Flg. request for subpoenas by plaintiff. Issg. same 21

4/21/67 Flg. Pre-Trial Note of Evidence by plaintiff 22

4/24/67 Flg. Notice that plaintiffs will take deposition of Chester A. Usry, or his duly appointed authorized representative on 4/27/67. 23

5/ 2/67 Flg. deposition of Wm. G. Oglesby, Harry T. Willis, James S. Fullwood, Hiram Hankins, Larney A. Johnson, Horrie O. Johnson, Alexander Dudley. (7 vols.) X

5/ 5/67 Flg. M.R. on subpoena. (1 executed) 24

5/16/67	Flg. Depositions of Ruby Morris, Frederick J. Herzog & Coulter Sabathier and Deposition of Calvin G. Shaw (2 vols)	X
5/29/67	Flg. deposition of Jack Thomas Styron.	X
5/16/67	Case called; SUBMITTED. Ent. 6/27/67.	25
7/14/67	Flg. Findings of Fact and Conclusions of Law by the Court; Judgment will be Entered. Ent. 7/19/67. Issg. notice.	26
8/ 7/67	JUDGMENT in favor of W. M. Webb, Inc. and against Deft. in the sum of $2,388.90, with interest; That Judgment be entered for Pltf. Carteret, Inc. and against Deft. in the sum of $1,082.68, with interest and costs; That judgment be entered for Pltf. C. B. Dey, Inc. and against Deft. in the sum of $249.10 with interest and costs, Etc. (FJC) Ent. 8/14/67. Issg. notice.	27
	CLOSED CASE J. S. 6.	
10/ 9/67	Flg. Defendant's notice of appeal.	28
11/13/67	Flg. motion and ORDER granting Deft. an extension of time to and including 1/7/68, to file record on appeal. Ent. 11/16/67. Issg. notice.	29

DOCKET ENTRIES

(Louisiana Bunkers, Inc., et al. v. United States, No. 15171)

DATE	PROCEEDINGS	Date Order or Judgment Noted
12/17/64	Flg. complaint. Issg. 4 summons.	1
12/31/64	Flg. M.R. on summons (Serv. U. S. A. thru Internal Revenue Serv. on 12/22/64; thru U. S. Attorney on 12/22/64 via personal service; thru The Attorney Gen. via certified mail on 12/26/64, 2 copies.)	2
2/26/65	Flg. ANSWER by Deft.	3
3/26/65	Flg. interrogs. propounded to Pltfs. by Deft.	4
3/26/65	Flg. motion of Deft. to drop parties Pltf., notice of hearing on 4/7/65.	5
3/29/65	Flg. stipulation of parties of withdrawal of Deft's. motion to drop parties Pltf. notice of hearing on 4/7/65.	6
6/ 7/65	Flg. Answers to interrogs. by Pltfs.	7
12/ 1/65—	Flg. Trial Request by Pltf.	8
2/11/66	Flg. request for admission of facts proposed by pltfs. to deft.	9
3/ 3/66	Flg. opposition to motion of Deft. to extend time by Pltf.	10
4/18/66	Flg. stipulation of parties that the time within which to file pleadings is extended for a period of 90 days.	11
4/19/66	Flg. stipulation of parties and ORDER granting Deft. an extension of time for a period of 90 days, within	

	which to file pleadings. Ent. 4/19/66. Issg. notice.	12
8/ 5/66	Flg. notice of taking depositions of Pltfs. thru Jack T. Styron by Deft. on 8/25/66.	13
9/ 9/66	Flg. Deft's. Answer to request for admission of facts.	14
3/14/67	Flg. Notice that defendant will take depositions of Larnie Johnson, Alex Dudley and David B. Willis on 4/3/67.	15
3/23/67	Flg. Joint Motions by parties to consolidate and ORDER that C.A. 15170, 15171, 15172, 15215 and 15216 be consolidated for trial and that jury demand be withdrawn. (F.J.C.) Ent. 3/27/67. Issg. notice.	16
5/29/67	Flg. deposition of Jack Thomas Styron	X
5/16/67	Case called: SUBMITTED. Ent. 6/27/67.	17
7/14/67	Flg. Findings of Fact and Conclusions of Law by the Court; Judgment will be entered. Ent. 7/19/67. Issg. notice.	x
8/ 7/67	JUDGMENT in favor of Pltf. Louisiana Bunkers, Inc. and against Deft. in the sum of $2,254.75 with interest and costs; Judgment in favor of Pltf. Plaquemines Bunkers, Inc. and against Deft. in the sum of $1,005.32 with interest and costs and Judgment in favor of Pltf. Charles S. Wallace,	

	III, Inc. and against Deft in the sum of $1,498.83 with interest and costs, Etc. (FJC) Ent. 8/14/67. Issg. notice	18
10/ 9/67	Flg. Defendant's notice of appeal.	19
11/13/67	Flg. motion and Order granting Deft. an extension of time to and including 1/7/68, within which to file record on appeal. Ent. 11/16/67. Issg. notice.	20

DOCKET ENTRIES

(Santos Menhaden Corporation, et al. v. United States, No. 15172)

Date	Proceedings	Date Order or Judgment Noted	
2/17/64	Flg. complaint. Issg. 4 summons		1
2/31/64	Flg. M.R. on summons (Serv. U. S. A. thru Dist. Director of Internal Revenue via Agt. Sabathien on 12/22/64;; thru U. S. Attorney in person on 12/22/64; thru The Attorney General via certified mail on 12/26/64, 2 copies.)		2
2/10/65	Flg. motion of Deft. to drop parties plaintiff, Citation, Inc., and Novelty, Inc., notice of hearing on 2/17/65; memo in support.		3
2/16/65	Flg. joint motion of parties and ORDER CONTINUING Deft.'s motion to drop parties Pltf. from 2/17/65 to 3/3/65. Ent. 2/17/65. Issg. notice.		4
2/26/65	Flg. ANSWER by Deft.		5
2/26/65	Flg. joint motion of parties and ORDER, dated 3/3/65, continuing Deft's. motion to drop parties to 3/10/65. Ent. 3/3/65. Issg. ntc.		6
3/10/65	Hearing and Order that the motion of Deft. U.S. of A., to drop parties Pltf. Citation, Inc. and Novelty, Inc., be DENIED without prejudice to the right of Deft. to re-new said motion at a later date. Ent. 3/12/65. Issg. ntc.		7

3/26/65	Flg. interrogs. propounded to Pltfs. by Deft.	8
6/18/65	Flg. Answers to interrogs. by Pltfs.	9
12/ 1/65	Flg. TRIAL REQUEST by Pltf.	10
2/11/66	Flg. request for admission of facts proposed by pltfs. to deft.	11
3/ 3/66	Flg. opposition to motion of Deft. to extend time by Pltf.	12
4/18/66	Flg. stipulation of parties that the time within which the Deft. is to file pleadings is extended for a period of 90 days.	13
4/19/66	Flg. stipulation of parties and ORDER granting Deft. an extension of 90 days time, within which to file pleadings. Ent. 4/19/66. Isg. notice.	14
8/ 5/66	Flg. notice of taking depositions of Pltfs. thru W. B. Kornegay by Deft. on 8/24/66.	15
8/31/66	Flg. deposition of Wilson Brightman Kornegay.	x
9/ 9/66	Flg. Deft's. Answer to request for admission of facts.	16
6/14/67	Flg. Notice that defendant will take deposition of H. O. Johnson on 4/3/67.	17
3/23/67	Flg. Joint Motions by parties to consolidate and ORDER that C.A. 15170, 15171, 15172, 15215 and 15216 be consolidated for trial and that jury demand be withdrawn. (F.J.C.) Ent. 3/27/67. Issg. notice.	18

5/29/67	Flg. deposition of Jack Thomas Styron.	x
6/16/67	Case called; SUBMITTED. Ent. 6/27/67.	19
7/14/67	Flg. Findings of Fact and Conclusions of Law by the Court; Judgment will be entered. Ent. 7/19/67. Issg. notice	x
8/ 7/67	JUDGMENT in favor of Pltf. Santos Menhaden Corp. and against Deft. in the sum of $3,655.16 with interest and costs; Judgment in favor of Pltf. Citation, Inc., and against Deft. in the sum of $2,843.88 with interest; Judgment in favor of Pltf. Novelty, Inc. and against Deft. in the sum of $801.25 with interest and costs, Etc. (FJC) Ent. 8/14/67. Issg. notice.	20
10/ 9/67	Flg. Defendant's notice of appeal. CLOSED CASE	21
11/13/67	Fg. motion and ORDER granting Deft. an extension of time to and including 1/7/68, within which to file record on appeal. Ent. 11/16/67. Issg. notice.	22

(SEAL)

DOCKET ENTRIES

(Patterson Menhaden, Inc., et al. v. United States, No. 15215)

Date	Proceedings	Date Order or Judgment Noted
1/ 6/65	Flg. complaint. Issg. 4 summons.	1
1/13/65	Flg. M.R. on summons (serv. U.S.A. thru Atty. General via certified mail on 1/11/65 — 2 copies; U.S.A. thru U.S. Atty. via J. Jara on 1/12/65; District Director of Internal Revenue thru agent on 1/8/65)	2
3/17/65	Flg. ANSWER by Deft. with jury demand.	3
3/26/65	Flg. interrogs. propounded to Pltfs. by Deft.	4
6/21/65	Flg. Answers to interrogs. by Pltfs.	5
12/ 1/65	Flg. TRIAL REQUEST by Pltf.	6
2/11/66	Flg. request for admission of facts proposed by pltfs. to deft.	7
3/ 3/66	Flg. opposition to motion of Deft. to extend time by Pltf.	8
4/18/66	Flg. stipulation of parties that the time within which the Deft. it to file pleadings is extended for a period of 90 days.	9
4/19/66	Flg. stipulation of parties and ORDER, dated 4/20/66, granting Deft. an extension of 90 days, within which to file pleadings. Ent. 4/21/66. Issg. notice	10

8/ 5/66	Flg. notice of taking depositions of Pltfs. by Deft. thru W. B. Kornegay on 8/24/66.	11
9/ 9/66	Flg. Deft's. Answer to request for admission of facts.	12
3/23/67	Flg. Joint Motions by parties to consolidate and ORDER that C.A. 15170, 15171, 15172, 15215 and 15216 be consolidated for trial and that jury demand be withdrawn. (F.J.C.) Ent. 3/27/67. Issg. notice.	13
5/29/67—	Flg. deposition of Jack Thomas Styron.	x
5/16/67	Case called; SUBMITTED. Ent. 6/27/67.	14
7/14/67	Flg. Findings of Fact and Conclusions of Law by the Court; Judgment will be entered. Ent. 7/19/67. Issg. notice.	x
8/ 7/67	JUDGMENT in favor of Patterson Menhaden, Inc. and against Deft. in the sum of $2,520.43, with interest and costs; Judgment in favor of Pltf. Aggie & Millie, Inc. and against Deft. in the sum of $1,339.63 with interest and costs, Etc. (FJC) Ent. 8/14/67. Issg. notice.	15
	CLOSED CASE	
10/ 9/67	Flg. Defendant's notice of appeal.	16
11/13/67	Flg. motion and ORDER granting Deft. an extension of time to file record on appeal to and including 1/7/68. Ent. 11/16/67. Issg. notice.	17

(SEAL)

DOCKET ENTRIES

(G. B. L., Inc., et al. v. United States, No. 15216)

Date	Proceedings	Date Order or Judgment Noted
1/ 6/65	Flg. complaint. Issg. 4 Summons.	1
1/13/65	Flg. M.R. on summons (serv. U.S.A. thru Atty. General via certified mail on 1/11/65; U.S.A. thru U.S. Atty. via J. Jara on 1/12/65; District Director of Internal Revenue via agent on 1/8/65)	2
3/17/65	Flg. ANSWER and jury demand by Deft.	3
3/26/65	Flg. interrogs. propounded to Pltfs. by Deft.	4
6/ 7/65	Flg. Answers to Interrogs. by Pltfs.	5
12/ 1/65	Flg. TRIAL REQUEST by Pltf.	6
2/11/66	Flg. request for admission of facts proposed by pltfs. to deft.	7
3/ 3/66	Flg. opposition to motion of Deft. to extend time by Pltf.	8
4/18/66	Flg. stipulation of parties, that the time within which the Deft. is to file pleadings is extended for a period of 90 days.	9
4/19/66	Flg. stipulation of parties and ORDER granting Deft. an extension of 90 days time within which to file pleadings. Ent. 4/19/66. Issg. notice.	10

8/ 5/66	Flg. notice of taking depositions of Pltf. thru Jack T. Styron by Deft. on 8/25/66.	11
9/ 9/66	Flg. Deft's. Answer to request for admission of Facts.	12
3/14/67	Flg. Notice that defendant will take depositions of H. T. Willis, Sr. and John Gordon Whitehead on 4/3/67.	13
3/23/67	Flg. Joint Motions by parties, to consolidate and ORDER that C.A. 15170, 16171, 15172, 15215 be consolidated for trial and that jury demand be withdrawn. (F.J.C.) Ent. 3/27/67. Issg. notice.	14
5/29/67	Flg. deposition of Jack Thomas Styron.	x
5/16/67	Case called; SUBMITTED. Ent. 6/27/67.	15
7/14/67	Flg. Findings of Fact and Conclusions of Law by the Court; Judgment will be entered. Ent. 7/19/67. Issg. notice.	x
8/ 7/67	JUDGMENT in favor of Pltf. G.B.L., Inc. and against Deft. in the sum of $2,295.65 with interest and costs; Judgment in favor of Pltf. Merlin, Inc. and against Deft. in the sum of $1,135.23 with interest and costs; Judgment in favor of Pltfs. Frances Louise and Patricia Ann Webb, t/a Webb-Bunker Co. and against Deft. in the sum of	

	$1,484.58 with interest and costs, Etc. (FJC) Ent. 8/14/67. Issg. notice.	16
	CLOSED CASE J.S. 6	
10/ 9/67	Fgl. Defendant's notice of appeal.	17
11/13/67	Flg. motion and ORDER granting Deft. an extension of time to file record on appeal to and including 1/7/68. Ent. 11/16/67. Issg. notice.	18

(SEAL)

DOCKET ENTRIES IN COURT OF APPEALS

Date	
10/14/68	Argument and submission of case
11/6/68	Opinion, Hunter, Dist. Ct. J.
11/6/68	Judgment
11/29/68	Judgment issued as mandate

COMPLAINT FOR REFUND OF FEDERAL EMPLOYMENT TAXES ERRONEOUSLY PAID AND UNLAWFULLY COLLECTED.

Filed: Dec. 17, 1964

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

W. M. WEBB, INCORPORATED,
1221 North Broad Street
New Orleans 19, Louisiana

CARTERET, INCORPORATED,
1221 North Broad Street
New Orleans, Louisiana,

C. P. DEY, INCORPORATED,
1221 North Broad Street,
New Orleans, Louisiana,

Plaintiffs,

vs. CIVIL ACTION NO. 15170

UNITED STATES OF AMERICA,

Defendant.

1. This Court has jurisdiction under the provisions of Sections 1402 and 1346(a)(1), Title 29, United States Code.

2. The plaintiffs are each separate corporations organized under the laws of the State of Louisiana and maintain their principal places of business in the State of Louisiana.

3. The defendant is the United States of America.

4. The issues of law and fact with respect to all plainitffs and the defendant are similar.

5. The plaintiffs by this action seek to recover Federal Insurance Contributions Taxes and Federal Unemployment Act taxes erroneously paid to and collected by the defendant.

6. The plaintiffs during the year 1956 filed appropriate federal employment tax returns with the District Director of Internal Revenue at New Orleans, Louisiana, and erroneously paid federal employment taxes on the earnings of certain fishermen listed thereon.

7. The plaintiffs, during the period of the claim filed in these proceedings, commencing with the quarter ending March 31, 1956 through the quarter ending December 31, 1956, were engaged in the busines of commercial fishing. The working arrangements between the plaintiffs and the fishermen were such that a relationship of employer and employee as "employee" is defined under the common law rules, did not in fact exist. The relationship between the plaintiffs and the fishermen was one other than employer and employee as that relation is defined by the provisions of §§3121 (d) and 3306(i), Internal Revenue Code.

8. The plaintiffs, under the erroneous belief that the fishermen were "employees", heretofore paid federal employment taxes based on their earnings for which plaintiffs were not liable.

9. The plaintiffs filed claims for refund with the District Director of Internal Revenue at New Orleans, Louisiana, on the following dates:

W. M. Webb, Inc. - on December 29, 1959 and amended May 30, 1960;
Carteret, Inc. - on December 29, 1959 and amended on May 30, 1960;
C. P. Dey, Inc. - on December 29, 1959 and amended on May 30, 1960.

10. More than six months have elapsed since the filing of these claims. This action therefore is timely filed.

11. By reason of the foregoing, plaintiffs claim refunds of Federal Insurance Contributions taxes and Federal Unemployment Act taxes as follows:

Federal Insurance Contributions Act Taxes-
W. M .Webb, Inc. - $2,077.30
Carteret Inc. - 941.46
C. P. Dey, Inc. - 216.61

Federal Unemployment Taxes -
W. M. Webb, Inc. - $ 311.60
Carteret, Inc. - 141.22
C. P. Dey, Inc. - 32.49

WHEREFORE, plaintiffs pray that judgment be granted to each in the amount of:

W. M. Webb, Inc. - $2,388.90
Carteret, Inc. - 1,082.68
C. P. Dey, Inc. - 249.10

together with statutory interest and costs.

(Signed) DAVID E. HOGAN
David E. Hogan -
Richard Garvey
910 Maison Blanche
921 Canal Street
New Orleans, Louisiana

(Signed) JOSEPH J. LYMAN
Joseph J. Lyman
1200-18th Street, N. W.
Washington, D. C.
Attorneys for Plaintiffs

ANSWER

Filed: Feb. 26, 1965

In the United States District Court for the
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Incorporated,
Carteret, Incorporated,
C. P. Dey, Incorporated,

Plaintiffs

v. Civil Action No. 15170
Division "D"

United States of America,

Defendant

Subject to its Motion to Drop Parties Plaintiff, the defendant, for its Answer to the complaint, alleges as follows:

1. Denies the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5, except denies that any taxes were erroneously paid or collected.

6. Admits the allegations contained in paragraph 6, except denies that any amount was erroneously paid.

7. Denies the allegations contained in paragraph 7.

8. Denies the allegations contained in paragraph 8, except admits that the plaintiffs paid federal employment taxes with respect to the fishermen.

9. Admits the allegations contained in paragraph 9. The defendant affirmatively alleges that the claims for refund filed herein were not timely with respect to all taxes paid, and that the court, accordingly, does not have jurisdiction over the entire amount paid.

10. Admits the allegations contained in the first sentence of paragraph 10, and denies the allegations contained in the second sentence of paragraph 10.

11. Denies the allegations contained in paragraph 11.

WHEREFORE, defendant prays that the plaintiffs' complaint be dismissed with prejudice, for costs and for such other relief as this court deems proper.

LOUIS C. LA COUR
United States Attorney

(Signed) EDWARD A. COPLEY
Edward A. Copley
Attorney, Tax Division
Department of Justice
416-422 United States Court House
Fort Worth, Texas 76102
ATTORNEY FOR DEFENDANT

DEMAND FOR JURY TRIAL

The defendant respectfully requests trial by jury of all fact issues herein.

(Signed) EDWARD A. COPLEY
Edward A. Copley

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Answer has been served upon plaintiffs through their counsel of record by placing a copy thereof in the United States mails, postage prepaid, on this the 23rd day of February, 1965, addressed to David E. Hogan, Esquire, 910 Maison Blanche Building, New Orleans Louisiana, and Joseph J. Lyman, Esquire, 1200 - 18th Street, N. W., Washington, D. C.

(Signed) EDWARD A. COPLEY
Edward A. Copley

COMPLAINT FOR REFUND OF FEDERAL UNEMPLOYMENT TAXES ERRONEOUSLY PAID AND UNLAWFULLY COLLECTED

Filed: Dec. 17, 1964

In the United States District Court for the
Eastern District of Louisiana
New Orleans Division

LOUISIANA BUNKERS, INC.
a corporation,
1221 North Broad Street
New Orleans 19, Louisiana

PLAQUEMINES BUNKERS, INC.,
a corporation,
1221 North Broad Street
New Orleans, Louisiana

CHARLES S. WALLACE, III, INC.
a corporation,
1221 North Broad Street
New Orleans 19, Louisiana,

Plaintiffs,

versus Civil Action No. 15171
Division "B"

UNITED STATES OF AMERICA,

Defendant.

1. This Court has jurisdiction under the provisions

of Sections 1402 and 1346 (a)(1), Title 28, United States Code.

2. The plaintiffs are each separate corporations organized under the laws of the State of Louisiana and maintain their principal places of business in the State of Louisiana.

3. The defendant is the United States of America.

4. The issues of law and fact with respect to all plaintiffs and the defendant are similar.

5. The plaintiffs by this action seek to recover Federal Insurance Contributions Taxes and Federal Unemployment Act taxes erroneously paid to and collected by the defendant.

6. The plaintiffs during the year 1956 filed appropriate federal unemployment tax returns with the District Director of Internal Revenue at New Orleans, Louisiana, and erroneously paid federal employment taxes on the earnings of certain fishermen listed thereon.

7. The plaintiffs, during the period of the claim filed in these proceedings, commencing with the quarter ending March 31, 1956 through the quarter ending December 31, 1956, were engaged in the business of commercial fishing. The working arrangements between the plaintiffs and the fishermen were such that a relationship of employer and employee, as "employee" is defined under the common law rules, did not in fact exist. The relationship between the plaintiffs and the

fishermen was one other than employer and employee as that relation is defined by the provisions of §§3121(d) and 3306(i), Internal Revenue Code.

8. The plaintiffs, under the erroneous belief that the fishermen were "employees", heretofore paid federal employment taxes based on their earnings for which plaintiffs were not liable.

9. The plaintiffs filed claims for refund with the District Director of Internal Revenue at New Orleans, Louisiana, on the following dates:

Louisiana Bunkers, Inc. — on December 29, 1959 and amended May 30, 1960;
Plaquemines Bunkers, Inc. — on December 29, 1959 and amended May 30, 1960;
Charls S. Wallace, III, Inc. — on January 14, 1960 and amended May 30, 1960.

10. More than six months have elapsed since the filing of these claims. This action therefore is timely filed.

11. By reason of the foregoing, plaintiffs claim refunds of Federal Insurance Contributions taxes and Federal Unemployment Act taxes as follows:

Federal Insurance Contributions Act taxes —	
Louisiana Bunkers, Inc.	$1,960.65
Plaquemines Bunkers, Inc.	874.19
Charles S. Wallace III, Inc.	1,303.33

Federal Unemployment Taxes —

Louisiana Bunkers, Inc.	$ 294.10
Plaquemines Bunkers, Inc.	131.13
Charles S. Wallace III, Inc.	195.50.

WHEREFORE, plaintiffs pray that judgment be granted to each in the amount of:

Louisiana Bunkers, Inc.	$2,254.75
Plaquemines Bunkers, Inc.	1,005.32
Charles S. Wallace III, Inc.	,498.83,

together with statutory interest and costs.

(Signed) DAVID E. HOGAN
David E. Hogan &
Richard Garvey
910 Maison Blanche Bldg.
921 Canal Street
New Orleans, Louisiana
(Signed) JOSEPH J. LYMAN
Joseph J. Lyman
1200-18th Street, N. W.
Washington, D. C.
Attorneys for Plaintiffs

ANSWER

(Louisiana Bunkers, Inc., et al. v. United States, No. 15171)

Filed: Feb. 26, 1965

Subject to its Motion to Drop Parties Plaintiff, the defendant, for its Answer to the complaint, alleges as follows:

1. Denies the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5, except denies that any taxes were erroneously paid or collected.

6. Admits the allegations contained in paragraph 6, except denies that any amount was erroneously paid.

7. Denies the allegations contained in paragraph 7.

8. Denies the allegations contained in paragraph 8, except admits that the plaintiffs paid federal employment taxes with respect to the fishermen.

9. Admits the allegations contained in paragraph 9. The defendant affirmatively alleges that the claims

for refund filed herein were not timely with respect to all taxes paid, and that the court, accordingly, does not have jurisdiction over the entire amount paid.

10. Admits the allegations contained in the first sentence of paragraph 10, and denies the allegations contained in the second sentence of paragraph 10.

11. Denies the allegations contained in paragraph 11.

WHEREFORE, defendant prays that the plaintiffs' complaint be dismissed with prejudice, for costs and for such other relief as this court deems proper.

LOUIS C. LA COUR
United States Attorney
(Signed) EDWARD A. COPLEY
EDWARD A. COPLEY
Attorney, Tax Division
Department of Justice
416-422 United States
Court House
Fort Worth, Texas 76102
ATTORNEY FOR
DEFENDANT

DEMAND FOR JURY TRIAL

The defendant respectfully requests trial by jury of all fact issues herein.

(Signed) EDWARD A. COPLEY
EDWARD A. COPLEY

COMPLAINT FOR REFUND OF FEDERAL EMPLOYMENT TAXES ERRONEOUSLY PAID AND UNLAWFULLY COLLECTED

Filed: Dec. 17, 1964

In the United States District Court for the
Eastern District of Louisiana
New Orleans Division

Santos Menhaden Corporation
Patterson, Louisiana,
Citation, Incorporated,
Post Office Box 98
Patterson, Louisiana,
Novelty, Incorporated,
Patterson, Louisiana,

Plaintiffs

versus Civil Action No. 15172
Division "D"

The United States of America,

Defendant.

1. This Court has jurisdiction under the provisions of Sections 1402 and 1346(a)(1), Title 29, United States Code.

2. The plaintiffs are each separate corporations organized under the laws of the State of Louisiana and maintain their principal places of business in the State of Louisiana.

3. The defendant is the United States of America.

4. The issues of law and fact with respect to all plaintiffs and the defendant are similar.

5. The plaintiffs by this action seek to recover Federal Insurance Contributions Taxes and Federal Unemployment Act taxes erroneously paid to and collected by the defendant.

6. The plaintiffs during the year 1956 filed appropriate federal employment tax returns with the District Director of Internal Revenue at New Orleans, Louisiana, and erroneously paid federal employment taxes on the earnings of certain fishermen listed thereon.

7. The plaintiffs, during the period of the claim filed in these proceedings, commencing with the quarter ending March 31, 1956 through the quarter ending December 31, 1956, were engaged in the business of commercial fishing. The working arrangements between the plaintiffs and the fishermen were such that a relationship of employer and employee, as "employee" is defined under the common law rules, did not in fact

exist. The relationship between the plaintiffs and the fishermen was one other than employer and employee as that relation is defined by the provisions of §§3121(d) and 3306(i), Internal Revenue Code.

8. The plaintiffs, under the erroneous belief that the fishermen were "employees", heretofore paid federal employment taxes on their earnings for which plaintiffs were not liable.

9. The plaintiffs filed claims for refund with the District Director of Internal Revenue at New Orleans, Louisiana, on December 31, 1959; these claims were amended on or about May 30, 1960.

10. More than six months have elapsed since the filing of these claims. This action therefore is timely filed.

11. By reason of the foregoing, plaintiffs claim refunds of Federal Insurance Contributions taxes and Federal Unemployment Act taxes as follows:

Federal Insurance Contributions Act Taxes —

Santos Menhaden Corporation	$3,178.40
Citation, Incorporated	2,472.94
Novelty, Incorporated	696.74

Federal Unemployment Taxes —

Santos Menhaden Corporation	$ 476.76
Citation, Incorporated	370.94
Novelty, Incorporated	104.51.

WHEREFORE, plaintiffs pray that judgment be granted to each in the amount of:

Santos Menhaden Corporation:	$3,655.16;
Citation, Incorporated:	2,843.88;
Novelty, Incorporated:	801.25,

together with statutory interest and costs.

(Signed) DAVID E. HOGAN
David E. Hogan &
Richard Carvey
910 Maison Blanche
921 Canal Street
New Orleans, Louisiana
(Signed) JOSEPH J. LYMAN
Joseph J. Lyman
1200 - 18th Street, N.W.
Washington, D. C.
Attorneys for Plaintiffs

ANSWER

(Santos Menhaden Corporation, et al. v. United States, No. 15172)

Filed: Feb. 26, 1965

Subject to its Motion to Drop Parties Plaintiff, the defendant, for its Answer to the complaint, alleges as follows:

1. Denies the allegations contained in paragraph 1.

2. Admits the allegations contained in paragraph 2.

3. Denies the allegations contained in paragraph 3.

4. Denies the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5, except denies that any taxes were erroneously paid or collected.

6. Admits the allegations contained in paragraph 6, except denies that any amount was erroneously paid.

7. Denies the allegations contained in paragraph 7.

8. Denies the allegations contained in paragraph 8, except admits that the plaintiffs paid federal employment taxes with respect to the fishermen.

9. Admits the allegations contained in paragraph 9. The defendant affirmatively alleges that the claims for refund filed herein were not timely with respect to all taxes paid, and that the court, accordingly, does not have jurisdiction over the entire amount paid.

10. Admits the allegations contained in the first sentence of paragraph 10, and denies the allegations contained in the second sentence of paragraph 10.

11. Denies the allegations contained in paragraph 11.

WHEREFORE, defendant prays that the plaintiffs'

complaint be dismissed with prejudice, for costs and for such other relief as this court deems proper.

LOUIS C. LA COUR
United States Attorney
(Signed) EDWARD A. COPLEY
EDWARD A. COPLEY
Attorney, Tax Division
Department of Justice
416-422 United States
Court House
Fort Worth, Texas 76102
ATTORNEY FOR
DEFENDANT

DEMAND FOR JURY TRIAL

The defendant respectfully requests trial by jury of all fact issues herein.

(Signed) EDWARD A. COPLEY
EDWARD A. COPLEY

COMPLAINT FOR REFUND OF FEDERAL EMPLOYMENT TAXES ERRONEOUSLY PAID AND UNLAWFULLY COLLECTED.

Filed: Jan. 6, 1965

In The United States District Court
For the Eastern District of Louisiana
New Orleans Division

Patterson Menhaden, Incorporated,
1221 North Broad Street
New Orleans, Louisiana
Aggie & Millie, Incorporated,
Plaintiffs,

vs. Civil Action No. 15215

The United States of America,
Defendant.

1. This Court has jurisdiction under the provisions of Section 1402 and 1346(a)(1), Title 29, United States Code.

2. The plaintiffs are each separate corporations organized under the laws of the State of Louisiana and maintain their principal places of business in the State of Louisiana.

3. The defendant is the United States of America.

4. The issues of law and fact with respect to all plaintiffs and the defendant are similar.

5. The plaintiffs by this action seek to recover Federal Insurance Contributions Taxes and Federal Unemployment Act taxes erroneously paid to and collected by the defendant.

6. The plaintiff Patterson Menhaden, Incorporated, during the year 1956, and the plaintiff Aggie & Millie, Incorporated, during the period June 30, 1957 through December 31, 1958, filed appropriate federal employment tax returns with the District Director of Internal Revenue at New Orleans, Louisiana, and erroneously paid federal employment taxes on the earnings of certain fishermen listed thereon.

7. The plaintiffs during the period of the claims filed in these proceedings were engaged in the business of commercial fishing. The working arrangements between the plaintiffs and the fishermen were such that a relationship of employer and employee, as "employee" is defined under the common law rules, did not in fact exist. The relationship between the plaintiffs and the fishermen was one other than employer and employee as that relation is defined by the provisions of §§3121(d) and 3306(i), Internal Revenue Code.

8. The plaintiffs, under the erroneous belief that the fishermen were "employees" heretofore paid federal employment taxes based on their earnings for which plaintiffs were not liable.

9. The plaintiff Patterson Menhaden, Incorporated filed a claim for refund with the District Director of Internal Revenue at New Orleans, Louisiana, on January 4, 1960. It was amended on about May 30,

1960. The plaintiff Aggie and Millie, Incorporated filed a claim for refund on October 7, 1960.

10. More than six months have elapsed since the filing of these claims. This action therefore is timely filed.

11. By reason of the foregoing, plaintiffs claim refunds of Federal Insurance Contributions taxes and Federal Unemployment Act taxes as follows:

Federal Insurance Contributions Act Taxes-
Patterson Menhaden, Incorporated - $2,191.68
Aggie & Millie, Incorporated $1,237.08

Federal Unemployment Taxes -
Patterson Menhaden, Incorporated - $328.75
Aggie & Millie, Incorporated $102.55

WHEREFORE, plaintiffs pray that judgment be granted to each in the amount of:

Patterson Menhaden, Incorporated - $2,520.43
Aggie & Millie, Incorporated - 1,339.63,

together with statutory interest and costs.

(Signed) DAVID E. HOGAN
David E. Hogan
901 Maison Blanche
921 Canal Street
New Orleans, Louisiana

(Signed) JOSEPH J. LYMAN
Joseph J. Lyman
1200-18th Street, N. W.
Washington, D. C.
Attorneys for Plaintiffs

ANSWER

(Patterson Menhaden, Inc., et al. v. United States, No. 15215)

Filed: Mar. 17, 1965

The defendant, United States of America, by and through its attorney, Louis C. LaCour, United States Attorney for the Eastern District of Louisiana, for its answer to the complaint herein alleges as follows:

1. Denies the allegations contained in paragraph 1.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5, except denies that any taxes were erroneously paid or collected.

6. Admits the allegations contained in paragraph 6, except denies that any amount was erroneously paid.

7. Denies the allegatitons contained in paragraph 7.

8. Denies the allegations contained in paragraph 8, except admits that the plaintiffs paid federal employment taxes with respect to the fishermen.

9. Admits the allegations contained in paragraph 9. The defendant affirmatively alleges that such claims for refund were not timely with respect to all taxes paid, and that the Court, accordingly, does not have jurisdiction over the entire amount paid.

10. Admits the allegations contained in the first sentence of paragraph 10, and denies the allegations contained in the second sentence of paragraph 10.

11. Denies the allegations contained in paragraph 11.

WHEREFORE, the defendant, United States of America, prays that this complaint be dismissed with prejudice, that all costs be assessed against the plaintiffs and that defendant have such other and further relief to which it may show itself justly entitled.

DEMAND FOR JURY TRIAL

The defendant respectfully requests trial by jury of all fact issues herein.

(Signed) WALTER F. GEMEINHARDT
Asst. United States Attorney

COMPLAINT FOR REFUND OF FEDERAL EMPLOYMENT TAXES ERRONEOUSLY AND UNLAWFULLY COLLECTED

Filed: Jan. 6, 1965

In the United States District Court for the
Eastern District of Louisiana
New Orleans Division

G. B. L., Incorporated,
1221 North Broad Street,
New Orleans, Louisiana

Merlin, Incorporated,
1221 North Broad Street,
New Orleans, Louisiana

Frances Louise Webb and Patricia
Ann Webb, t/a Webb-Bunker Company,
1221 North Broad Street
New Orleans, Louisiana

Plaintiffs,

versus Civil Action No. 15216
Division "A"

The United States of America,

Defendant.

1. This Court has jurisdiction under the provisions of §§ 1346(a)(1) and 1402, Title 29, United States Code.

2. The plaintiffs G. B. L., Incorporated and Merlin, Incorporated are separate corporations and were organized under the laws of the State of North Carolina. The plaintiff Webb-Bunker Co. was a partnership composed of Frances Louise Webb and Patricia Ann Webb. All plaintiffs maintained their principal places of business at New Orelans, Louisiana.

3. The defendant is the United States of America.

4. The issues of law and fact with respect to all plaintiffs and the defendant are similar.

5. The plaintiffs by this action seek to recover Federal Insurance Contributions Taxes and Federal Unemployment Act Taxes erroneously paid to and collected by the defendant.

6. The plaintiffs during the year 1956 filed appropriate federal employment tax returns with the District Director of Internal Revenue at New Orleans, Louisiana, and erroneously paid federal employment taxes on the earnings of certain fishermen listed thereon.

7. The plaintiffs, during the period of the claim filed in these proceedings, commencing with the quarter ending March 31, 1956 through the quarter ending December 31, 1956, were engaged in the business of commercial fishing. The working arrangements between the plaintiffs and the fishermen were such that a relationship of employer and employees, as "employee" is defined under the common law rules, did not in fact exist. The relationship between the plaintiffs and the

fishermen was one other than employer and employee as that relation is defined by the provisions of §§3121(d) and 3306(i), Internal Revenue Code.

8. The plaintiffs, under the erroneous belief that the fishermen were "employees", heretofore paid federal employment taxes based on their earnings for which plaintiffs were not liable.

9. The plaintiffs filed claims for refund with the District Director of Internal Revenue at New Orleans, Louisiana, on the following dates:

G. B. L., Inc. — on December 29, 1959, and amended May 30, 1960;
Merlin, Inc. — on January 4, 1960, and amended May 30, 1960;
Webb-Bunker Co. — —on December 29, 1959, and amended May 30, 1960.

10. More than six months have elapsed since the filing of these claims. This action therefore is timely filed.

11. By reason of the foregoing, plaintiffs claim refunds of Federal Insurance Contributions taxes and Federal Unemployment Act taxes as follows:

Federal Insurance Contributions Act taxes —	
G. B. L., Incorporated —	$1,996.22
Merlin, Incorporated —	987.16
Webb-Bunker Company —	1,290.94

Federal Unemployment Act taxes —

G. B. L., Incorporated —	$299.43
Merlin, Incorporated —	148.07
Webb-Bunker Company	193.64.

WHEREFORE, plaintiffs pray that judgment be granted to each in the amount of:

G. B. L., Incorporated —	$2,295.65
Merlin, Incorporated —	1,135.23
Webb-Bunker Company —	1,484.58,

together with statutory interest and costs.

(Signed) DAVID E. HOGAN
David E. Hogan
901 Maison Blanche
921 Canal Street
New Orleans, Louisiana

(Signed) JOSEPH J. LYMAN
Joseph J. Lyman
1200 - 18th Street, N. W.
Washington, D. C.
Attorney for Plaintiffs

ANSWER

(G. B. L., Inc., et al. v. United States, No. 15216)

Filed: Mar. 17, 1965

The defendant, United States of America, by and through its attorney, Louis C. LaCour, United States Attorney for the Eastern District of Louisiana, for its answer to the complaint here alleges as follows:

1. Denies the allegations contained in paragraph 1.

2. Denies knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2.

3. Admits the allegations contained in paragraph 3.

4. Denies the allegations contained in paragraph 4.

5. Admits the allegations contained in paragraph 5, except denies that any taxes were erroneously paid or collected.

6. Admits the allegations contained in paragraph 6, except denies that any amount was erroneously paid.

7. Denies the allegations contained in paragraph 7.

8. Denies the allegations contained in paragraph 8, except admits that the plaintiffs paid federal employment taxes with respect to the fishermen.

9. Admits the allegations contained in paragraph 9, except alleges that such amended claims for refund were filed on May 27, 1960, rather than May 30, 1960.

10. Admits the allegations contained in the first sentence of paragraph 10 and denies the allegations contained in the second sentence of paragraph 10.

11. Admits the allegations contained in paragraph 11, except denies that plaintiffs are entitled to refund of any taxes.

WHEREFORE, the defendant, United States of America, prays that this complaint be dismissed with prejudice, that all costs be assessed against the plaintiffs and that defendant have such other and further relief to which it may show itself justly entitled.

DEMAND FOR JURY TRIAL

The defendant respectfully requests trial by jury of all factual issues herein.

(Signed) W. F. GEMEINHARDT
Asst. United States Attorney

PRE-TRIAL ORDER

Filed: March 23, 1967

In the United States District Court for the
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Incorporated,
Carteret, Incorporated,
C. P. Dey, Incorporated,
Plaintiffs,

versus Civil Action No. 15170
Section "E"

United States of America,
Defendant.

1. A pre-trial conference was held before Judge Fred J. Cassibry at New Orleans, Louisiana, on Thursday, March 23, 1967.

2. Appearances: For plaintiffs - Joseph J. Lyman [trial counsel],
David E. Hogan;

For defendant - Robert L. Waters, Tax Division, Department of Justice.

3. The plaintiffs, W. M. Webb, Inc., Carteret, Inc., and C. P. Dey, Inc. are suing the defendant, the United

States of America for refunds of federal employment taxes asserted to have been erroneously paid and collected during the period commencing with the quarter ending March 31, 1956 through the quarter ending December 31, 1956.

4. Jurisdiction is based on Section 1346(a)(1), Title 28, United States Code, and venue is based on Section 1402, Title 28, United States Code.

5. Motions pending:

(a) Joint motion to consolidate the instant case with the following:

G. B. L., Inc., Merlin, Inc. and Frances L. and Patricia Webb, etc. v. *United States,* Civil Action No. 15216, Section "A";
Louisiana Bunkers, Inc., Plaquemines Bunkers, Inc. and Charles S. Wallace III, Inc. v. *United States,* Civil Action No. 15171, Section "B";
Patterson Menhaden, Inc., Aggie & Millie, Inc. v. *United States,* Civil Action No. 15215, Division "C"; and

Santos Menhaden Corp., Citation, Inc. and Novelty, Inc. v. *United States,* Civil Action No. 15172, Section "D".

(b) Joint motion to withdraw trial by jury.

(c) Motion for an order that plaintiffs' Request for Admissions of Fact be deemed admitted by defendant.

6(a) In general the plaintiffs claim:

This is an action under the Internal Revenue laws of the United States for refunds of plaintiffs' portions of Federal Insurance Contributions Act taxes (FICA — an excise tax paid on the earnings of "employees") and Federal Unemployment Act taxes (FUTA — also an excise tax paid on the earnings of "employees") assessed pursuant to 26 U.S.C. §3100, et seq. (FICA) and §3300 et seq. (FUTA).

The issue to be decided is whether menhaden fishermen (captains and crewmen), performing fishing services on plaintiffs' menhaden boats, were "employees" of the plaintiffs as that term is defined under §§ 3121(d) and 3306(i), Internal Revenue Code, 26 U.S.C. §§ 3121(d) and 3306(i).

Plaintiffs contend that the menhaden fishermen were not "employees" under the common-law tests prescribed, as the basis for decision, in §§ 3121(d) and 3306(i), I.R.C. and the interpretive regulations, Treasury Regs. 26 C.F.R. §§ 31.3121(d) — 1 and 31.3306(i)-1.

Plaintiffs contend that under the arrangement between themselves and the fishermen they did not have, nor did they retain, the requisite degree of control over the fishermen respecting the manner and method of performance of the latters' work to constitute an employer-employee relationship, as defined by the statutes and regulations. If any control was retained by the plaintiffs, it was only a right to interfere to a degree that would assure a proper result from the under-

taking. Plaintiffs had no actual control over the crewmen, nor did they exercise any control over their fishing activities through the captains.

(b) In general, the defendant claims:

The applicable common law to which resort must be had in determining whether the relationship between the plaintiffs and the menhaden fishermen was one of employment is the general maritime law since the undertaking was to be performed on the high seas. The terms upon which the plaintiffs' menhaden boats were to be fished by the captains did not constitute the captains owners *pro hac vice* according to the maritime law but rather made the captains the employee of the plaintiffs. Through the captains, as employees and agents, the plaintiffs exercised the degree of control over the other crewmen that evidences employment according to the maritime law.

(c) There are no claims by any other parties.

7. The following facts are established by the pleadings, stipulations, or by admissions of counsel: See attached Schedule "A", titled "Stipulations".

8. Contested issues of Fact:

(a) Plaintiffs say that none of the basic or primary facts are in issue.

(b) The defendant says:

It is contemplated that most of the evidentiary facts will be free from dispute. Some dispute will exist insofar as ultimate or conclusory facts are concerned, for example, whether the terms upon which the menhaden boats were to be fished, according to express agreement and custom of the trade, showed that the undertaking was for the general account of the plaintiffs as opposed to the joint accounts of the plaintiffs and captains.

The defendant makes the following qualifications to the stipulated facts set forth in the following paragraphs of Schedule A hereto:

56-57. The phrase "turned over" does not mean the relationship created was one other than employment;

72-73. The settlement was so made, but the fishermen's compensation was paid them biweekly.

9. Contested issues of law:

(a) Plaintiffs say: The sole issue is whether or not plaintiffs exercised that degree of control over the manner or method of the fishermen's performance so as to create a master-servant or employer-employee relationship defined by common-law tests; or, whether the fishermen in their relationship with the plaintiffs fell somewhere outside of that category in any respect. If the fishermen were in the latter category, that is to say, not common-law employees, then plaintiffs had no

liability for the FICA and FUTA taxes originally assessed and now asserted to be refunded.

(b) The Defendant says: The sole issue is whether the terms upon which the menhaden boats were to be fished by the captains amounted to an agreement of employment according to the general maritime law between the plaintiffs and fishermen.

10. The following exhibits were marked for identification and examined by all counsel:

(a) *Plaintiffs' exhibits:*

#1 - Typical "Payroll Summary", used by plaintiffs to determine earnings of fisherman;

#2 - Plaintiffs' claims for refund on Treasury Department forms 843 (originals in possession of defendant);

#3 - Crew's catch record.

(b) *Defendant's exhibits:*

#1 - Typical payroll information summary for bi-weekly period of a menhaden boat;

#2 - Typical individual payroll record of a menhaden boat crewmember.

The authenticity of these exhibits has been stipulated, but they are subject to objections, if any, at the trial, other than to authenticity. If other exhibits are to be offered by any party, then, at least ten days prior to trial, they will be submitted to opposing counsel and a supplemental note of evidence will be filed into the record of the case.

11. Neither party intends to use charts, grafts, models, or the like.

12. *Plaintiffs* will call the following witnesses in the absence of reasonable notice to opposing counsel to the contrary:

Jack T. Styron, managing officer of the corporations, who will testify concerning the working relationship between the corporate boat owners and the captains;

Plaintiffs may call the following additional witnesses:

James Fullwood of Supply, North Carolina, and
Hiram Hankins of Morehead City, North Carolina, who will testify concerning the working relationship between the captains and corporate boat owners.

Defendant will call the following witnesses, in the absence of reasonable notice to opposing counsel to the contrary:

Defendant may call the following additional witnesses:
None

In the event there are other witnesses to be called at the trial, then, at least 10 days prior to trial, the names, addresses and the general subject matter of their testimony will be reported to opposing counsel, and a supplemental note of evidence will be filed into the record of the case. This restriction shall not apply to rebuttal witnesses, the necessity of whose testimony cannot reasonably be anticipated before the time of trial.

13. This is a non-jury case.

Paragraph 14 crossed by attorney JJL

15. It is stipulated that plaintiffs need not prove the amount claimed refundable in the Complaint. In the event judgment is entered for the plaintiffs, the amount will be computed by the defendant and submitted for the plaintiffs' agreement.

Defendant desires to depose several captains with the understanding that the depositions shall constitute evidence, rather than mere discovery. It is anticipated that these depositions will be taken on April 3, 1967 in either North Carolina or Louisiana. The parties believe that this will facilitate the disposition of the case and materially reduce testimony at the trial.

16. A realistic estimate of the length of the trial is one full day. The evidentiary depositions will be submitted for the Court's consideration without a formal reading into the record. The case is hereby set for trial

before the Court without a jury on the 17 day of May, 1967, at 10:00 o'clock a.m.

17. This pre-trial order has been formulated after conference at which counsel for the respective parties have appeared. Reasonable opportunity has been afforded counsel for corrections or additions prior to signing. Hereafter, this order will control the course of the trial and may not be amended except by consent of the parties and the Court, or by order of the Court to prevent manifest injustice.

18. Possibility of settlement of this case was considered. Dated this 23 day of March, 1967, New Orleans, La.

(Signed) FRED J. CASSIBRY
UNITED STATES
DISTRICT JUDGE

APPROVED:

(Signed) JOSEPH J. LYMAN
Joseph J. Lyman

(Signed) DAVID E. HOGAN
David E. Hogan
Counsel for Plaintiffs

(Signed) ROBERT L. WATERS
Robert L. Waters
Tax Division
U. S. Department of Justice
Counsel for Defendant.

SCHEDULE "A" TO PRE-TRIAL ORDER STIPULATION

In the United States District Court for the
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Incorporated,
Carteret, Incorporated,
C. P. Dey, Incorporated,
Plaintiffs,

versus Civil Action No. 15170

United States of America, Section "E"
Defendant.

1. The plaintiffs were corporations organized under the laws of the State of Louisiana and maintained their principal place of business in the State of Louisiana.

2. During the year 1956, the plaintiffs filed federal employment tax returns with the District Director of Internal Revenue at New Orleans, Louisiana and paid Federal Insurance Contributions (FICA) and Federal Unemployment Act Taxes (FUTA), computed on the earnings of certain fishermen listed thereon.

3. The plaintiffs filed timely claims for refund of the said taxes.

4. Plaintiffs' claims for refund of FICA taxes in-

cluded only the excise portion paid by the plaintiffs on the fishermen's earnings.

5. No claims were made by plaintiffs for the income tax portion of the FICA taxes paid by the fishermen on their earnings.

6. Plaintiffs' claims for refund were not disallowed by the District Director of Internal Revenue, but more than six months expired since the claims had been filed. The suit here was timely filed.

7. The plainitffs owned the menhaden boats concerned in this suit.

8. The plaintiffs' boats were equipped by them and operated for the purpose of catching menhaden fish.

9. The plaintiffs were engaged in commercially fishing for menhaden.

10. The plaintiffs fished for menhaden in the Gulf of Mexico and the Atlantic Ocean.

11. Plaintiffs fished for menhaden during a season of the year.

12. The season for fishing varied according to the area where the fish were running.

13. The summer season along the Atlantic seaboard ran from about May 15 through September 15.

14. The Atlantic winter fishing season extended from November 1 through January 15.

15. On the Gulf Coast, the plaintiffs fished for menhaden beginning April 15 and closed the season about October 1.

16. Some boats and captains would move back and forth between the fishing grounds to take advantage of the staggered seasons.

17. Plaintiffs' vessels used in fishing for menhaden were 85 feet to 150 feet in length.

18. A towering mast on the vessel, topped by a crow's nest, is used to scan the water for signs of feeding fish.

19. The aft part of the ships are built low to the water to facilitate the launching and retrieving of two smaller "purse boats".

20. "Purse boats" are crafts about 30 feet long, engine powered and are carried in the menhaden vessel's davits.

21. The crews of plaintiffs' boats consist of a captain, mate, pilot, engineer, cook and about 20 net handlers.

22. The crew is provided with mess cabins where they eat and relax between "sets".

23. The captains would usually put to sea before dawn.

24. The boats were often guided to fishing areas by pilots of spotter airplanes.

25. At other times the captain would choose a fishing ground and set out for it.

26. The two-way radio was a valuable instrument to the captains of the menhaden boats.

27. When menhaden boats spotted fish, some of the captains would many times take to the air waves for the purpose of directing each other to the spots where schools of menhaden were concentrated.

28. The exact location of the fish is often pin-pointed by the lookout in the crow's nest.

29. The lookout looks for two principal signs indicating the presence of a school of menhaden:

(a) The presence of porpoises or sharks which pursue the schools, causing the fish to cluster so tightly for protection that they are forced to break the surface; and

(b) The sighting of the fish as they feed, which gives the water a reddish-brown tinge because of the luster of their scales.

30. The food of menhaden consists entirely of minute surface life of the sea.

31. When the captains decided the school was of sufficient size, they ordered the purse boats lowered.

32. These boats get their name from the huge purse seine they carry.

33. The net is equally divided between the two craft which are lashed together as soon as they are launched.

34. At the same time the purse boats are lowered, a small, round-bottomed craft, known as a striker boat, is dropped overside.

35. The lone occupant of the striker boat, usually a fisherman with long experience, maneuvers the striker boat with oars until he reaches the far side of the school, so that the fish are between him and the purse boats.

36. While the striker boat is moving into position, the two purse boats head for the near side of the school of fish.

37. On this occasion, one purse boat is under the command of the captain and the mate is at the tiller of the other.

38. On reaching the school of fish, the purse boats are separated and swung into a big circle with the seine paying out over the gunwales.

39. During this operation, the top of the net is held to the surface by cork floats.

40. The bottom of the nets are weighted down by lead and brass rings.

41. When the purse boats meet on the far side of the school, the ends of the seine are made fast and the bottom is drawn together by means of a rope passed through the brass rings.

42. The above-described "pursing" effect traps the menhaden in the bowl-shaped net and prevents them from escaping.

43. The nets measure 1200 feet in circumference and are about 60 feet deep.

44. The nets are occasionally damaged when sharks get caught with the menhaden and cut their way to freedom.

45. Aside from sharks, the nets seldom bring up anything but menhaden because game fish have sufficient speed to swim away before the purse is closed.

46. Eventually, the captain gives the signal which brings the mother ship to the purse boats.

47. Part of the seine is made fast to the larger mother ship, with the purse boats moored in such a way that the three craft form a triangle.

48. The menhaden are then brought aboard the mother ship usually by a hydraulic pump.

49. Each complete operation is known as "making a set."

50. In an average day, a boat makes from three to six sets, depending on the size of the school and the success of the fishermen in capturing them.

51. On the way to port the crew washes the nets with brine to prevent deterioration.

52. Upon reaching the plant, the catch is pumped from the holds of the boat into a drum.

53. When filled, the drum tips and dumps the fish onto a conveyor which brings them into the plant.

54. One thousand fish are required to fill the drum.

55. This is the counting system that determines the amount of money earned by the captain and crew.

56. The plaintiffs would select a fisherman from the area to whom a boat would be turned over for the purpose of fishing for menhaden.

57. It was understood that the fisherman to whom the boat was turned over would be its captain and he was so recognized by the plaintiffs.

58. Any individual selected as captain would be one in whose honesty and integrity plaintiffs had confidence.

59. In addition to the confidence reposed above, the plaintiffs expected a captain to be able to:

(a) operate the boat;
(b) conduct the fishing operations, and
(c) select and get along with the crew he selected.

60. The arrangement between the plaintiffs and each captain was entirely oral.

61. It could be terminated voluntarily or involuntarily, although in practice this occurred only at times when a boat was in port.

62. While the arrangement could be terminated at any time, custom and practice was for it to be continued over an extended period of time for each boat and for more than one trip.

63. After an individual was selected as captain, he would take the boat identification papers to the Bureau of Customs and would register with said Bureau as captain of the boat as required by federal law.

64. The captains selected the men who would comprise the crews.

65. The captain was in full charge of the boat once the trip commenced.

66. The captain decided:

(a) when to start a trip;

(b) when to return;

(c) once a boat owner had determined to fish in the Atlantic Ocean or the Gulf of Mexico, it was the prerogative of the captain to decide where in such area to fish; i.e. the fishing ground to work;

(d) when to fish once the boat reached the area;

(e) how to fish (the actual mechanical process of operating the nets and gear); and

(f) all matters pertaining to the operation and fishing of the boat until it returned to plaintiffs' dock.

67. The plaintiffs gave no orders or instructions to the crews with respect to fishing activities.

68. The plaintiffs had certain general policies which were known to the captains and crews and which were a part of the arrangement between plaintiffs and each captain, for example:

(a) intoxicating liquors were not to be taken aboard the boats, and

(b) the catch of fish was to be brought to plaintiffs' docks, if possible, or where plaintiffs designated.

69. The captains and crewmen purchased and paid for their own groceries for each trip.

70. The captains and crews paid for their own personal items, such as foul weather clothes, and other wearing apparel.

71. The plaintiffs paid the cost of the fuel used by the boats.

72. Each trip was considered by the captains and plaintiffs as a separate transaction for purposes of making settlements.

73. A settlement sheet was prepared by plaintiffs' office personnel at the conclusion of each trip for each captain.

74. The payment to the crew for each trip depended entirely upon the proceeds of the catch.

75. There was no guarantee of compensation of any kind regardless of time or effort expended.

76. If a particular trip was unsuccessful, known in the trade as a "broker" and the value of the captain's portion of a catch was insufficient to cover the ~~captain's portion of a catch was insufficient to cover the~~ captain's portion of the expenses of the trip, the captain's portion of the expenses would be carried over to succeeding trips to be deducted from the captain's share of subsequent catches.

77. On occasion, plainitffs would make an advance of money to a captain out of their general funds with the understanding that it was a loan to be repaid.

Paragraph 78 omitted

79. The captain would charge the amount advanced by the plaintiffs against the particular crewman's share, which share had been agreed upon separately between the captain and the crewmen.

80. There was no express agreement specifying the extent to which plaintiffs had control over the fishing activities of the captains.

81. Each time and at the time a boat would return to port, the trip was considered completed and the work of fishing on that trip concluded.

Paragraph 82 omitted

83. The livelihood of a captain and crew depended upon their initiative and skill as fishermen, coupled with the probables of weather and the run of the menhaden.

84. The plaintiffs had no agreement with the captains which would entitled them to a preferred call on all of the time and services of the captains.

85. The captains decided how long the fishing trips would last.

86. When a captain's action aboard a boat was such as to endanger the lives of the personnel or damage property, the plaintiffs would refuse to let him take the boat out again and sever relations with him.

87. The plaintiffs would sometimes terminate a relationship with a captain who was unable to produce adequate catches of menhaden.

88. The captains were not required to keep a ship's log book or make written reports of any kind to the plaintiffs.

[1] In the United States
District Court for the
Eastern District of Louisiana
New Orleans Division

Filed: September 23, 1966

W. M. Webb, Incorporated,
Carteret, Incorporated,
C. P. Dey, Incorporated,
Plaintiffs
versus Civil Action No. 15170
Division "D"

The United States of America,
Defendant

TESTIMONY OF JACK T. STYRON, taken by the Defendant, by agreement, at 1221 North Broad Street, New Orleans, Louisiana, beginning at 10:00 o'clock a.m., on Wednesday, August 24, 1966.

[2] In the United States
District Court for the
Eastern District of Louisiana
New Orleans Division

Louisiana Bunkers, Inc., a corporation,
1221 North Broad Street
New Orleans, Louisiana

Plaquemines Bunkers, Inc., a corporation,
1221 North Broad Street
New Orleans, Louisiana
Charles S. Wallace, III, Inc., a corporation,
1221 North Broad Street
New Orleans Louisiana,

Plaintiffs

versus Civil Action No. 15171
Division "B"

The United States of America,

Defendant

Testimony of JACK T. STYRON, taken by the Defendant, by agreement, at 1221 North Broad Street, New Orleans, Louisiana, beginning at 10:00 o'clock a.m., on Wednesday, August 24, 1966.

[3] In the United States
District Court for the
Eastern District of Louisiana
New Orleans Division

G. B. L., Incorporated,
1221 North Broad Street
New Orleans, Louisiana

Merlin, Incorporated,
1221 North Broad Street
New Orleans, Louisiana

Webb-Bunker Company,
Frances Louise Webb and Patricia Ann Webb,
trading as Webb-Bunker Company,
1221 North Broad Street
New Orleans, Louisiana

Plaintiffs

versus Civil Action No. 15216
Division "A"

The United States of America,

Defendant

TESTIMONY OF JACK T. STYRON, taken by the Defendant, by agreement, at 1221 North Broad Street, New Orleans, Louisiana, beginning at 10:00 o'clock a.m., on Wednesday, August 24, 1966.

[4] APPEARANCES:

For the Plaintiffs:

JOSEPH J. LYMAN, Esq.
Attorney at Law
1200 18th Street, N.W.
Washington, D.C.

For the Defendant:

ROBERT L. WATERS, Esq.
Attorney at Law
Tax Division, Department of Justice
418 United States Courthouse
Fort Worth, Texas

PAUL W. WILLIAMS, Reporter

MR. WATERS:
As far as the stipulation is concerned, what about the signature of the witness?

MR. LYMAN:
Mr. Styron, you have the right to read and sign this deposition.

MR. STYRON:
Well, I wish to read and sign the deposition.

MR. WATERS:
We will have the signature of the witness before a Notary Public. We will waive all formalities with respect to filing the deposition. As soon as it is signed, just return it to the court reporter and he will file it.

JACK T. STYRON,
having been first duly sworn, was examined and [5] testified as follows:

CROSS-EXAMINATION

BY MR. WATERS:
Q Mr. Styron, would you state your full name and your current business address.
A My name is Jack Thomas Styron. My business address is 1221 North Broad Street, New Orleans, Louisiana.
Q Where do you reside, Mr. Styron?
A I reside at 5350 St. Bernard Avenue, New Orleans.
Q How long have you resided in New Orleans?
A For 12 years.

Q Where did you reside prior to that time?

A In Lake Charles, Louisiana.

Q Would you describe for me very briefly what your business history has been over the last 15 or 20 years.

A I have been associated with the menhaden industry, both in the Atlantic and in the Gulf of Mexico. I have had various duties. In some areas, the operation itself is quite unknown; in some areas, it is very well known.

Q Would you describe for me something about the [6] menhaden industry.

A Menhaden fish are fish that are found from New England to Cape Canaveral, Florida, along the Atlantic seaboard, and from Apalachicola, Florida, to Galveston, Texas, along the Gulf of Mexico. They are a herring-type fish containing a good portion of oil in the body of the fish.

Q What size fish are they?

A Well, the size varies, some of them caught have been as large as 21 inches in length on the Atlantic. The average size fish caught in the Gulf is roughly 11 to 13 inches. These fish travel in schools, and they take water through their gills and strain out these small nutrients that are in the water, and that is what they actually survive on.

Q They more or less eat through their gills?

A Yes, sir. They do not have teeth. They just filter — they are actually a little filtering plant. They just filter out of the water the nutrients that are in the water, and then they move off into other areas. We do not know too much about [7] where they go in the

off season, but in the early spring they appear in the coastal waters of the northern Gulf.

Q Would you describe for me the seasonal aspects of menhaden fishing and whether or not the seasons differ between the Atlantic seaboard and the Gulf Coast fishing grounds.

A The Gulf season usually starts around April 1st to the 15th, and it terminates as early as October 1st to October 15th.

Q Are there any game regulations concerning the seasonable aspect of this?

A No, sir. In the Atlantic, the fish appear off of the New York coast, New Jersey, Chesapeake Bay area, usually around May 15th. This terminates early in September. At the same time, there is a fishing operation off the Carolina coast, North Carolina coast, that is, and the Florida coast, which parallels the same period, although it may be a couple of weeks earlier starting and maybe a couple of weeks earlier terminating. Then they have what we call —

[8] Q Did you mention about when the season terminates on the Eastern Seaboard?

A Yes, sir. It terminates in early September, normally. Now, bear in mind this is the general, and there are exceptions to the rule in which some operators may attempt to start earlier and attempt to run longer based on the weather conditions, that type of thing. There is a limiting starting date in the Chesapeake Bay area. That is the only area I know of.

Q As a matter of regulation?

A Yes, sir.

Q By the State of Maryland?

A No, sir. The State of Maryland excludes fishing altogether.

Q Does this keep you from fishing closer in than three miles?

A Right. The State of Delaware has no starting date or closing date. I am giving you this information with as much information or accuracy that I know. If there has been some changes recently that I am not aware of, — well, I don't think there has been. I am pretty well up on it. [9] we have what we call the winter season or fall season off the Carolina coast, and this starts November 1st through 15th and has terminated as late as January 15th. This is the movement of the fish from the northern waters to the southern waters. They are migrating south in these tremendous bodies. It just happens that the outer banks of Carolina is the nearest point where the fish move by, and it is for that reason there is an operation there in the fall of the year. It has nothing to do with the fact that they are coming to feed there or anything else, but it is just the fish are moving south at that time.

Q Is the operation carried on fairly close to the shore, or how far out at sea do the fishing boats go?

A Well, the limiting factor naturally is where the fish are sighted and the depth of the water in which the fish are taken, but, generally speaking, very few fish are taken more than 15 miles offshore, but mostly within three miles to eight [10] or 10 miles is where the bulk of the fish are actually captured.

Q Now, would you describe for me a typical fishing operation insofar as what is an operating unit. Do you have a mother boat and purse boats?

A The unit consists of the mother boat, which is

either wooden or steel construction. It can be of either wood or steel construction. The newer ones are steel.

Q What size is it?

A They vary in length from 90 feet to 175 feet.

Q Would you describe for me some of the peculiar physical characteristics of a mother boat that is used for a menhaden operation.

A Well, it specifically is designed for the taking of menhaden in that the house arrangement is — the quarters are located forward and the midship of the vessel is reserved for the carrying of the cargo. The after section is where the propulsion units are located.

Q What sort of carrying capacity does an average sized menhaden boat have?

A There has been a trend in recent years to make [11] the units larger, and that has been brought about through the placing of refrigeration equipment on the vessels to be able to refrigerate the cargo, but I would say 200 to 300 tons of fish.

Q What sort of measuring capacity is commonly employed in the menhaden industry — pounds, hundredweights, barrels, tons?

A Well, the unit used is what we call the thousandfish. Now, the thousandfish is a volume container that contains 22,000, 222 cubic inches, and that is filled up and dumped. That may weigh 666 and two - thirds pounds. If all the fish were of standard size, there would be one thousand fish in there weighing two-thirds of a pound apiece. Naturally, it is just a volume measurement. Due to the composition of the body of the fish, it will vary in weight. Normally, one thousand fish will weigh 660 pounds. That is the unit which is used for the whole operation. Everything is referred to

in thousands. How that came about was that years and years ago they unloaded the [12] vessels with barrels, and they had a barrel of some size that they would drop down into the hold of the vessel, the men would fill it up, and they would raise it up. As they enlarged the operation and enlarged the vessels, they found they were getting too large a number, and somebody said, "Well, take three of these barrels and put them together to make one." Out of this came what we call the fish measuring device. We call it the fish dump. A fish dump holds three barrels. A barrel is 220 pounds. Now, there are some plants that use dumps that are larger in size than one thousand, but even so the recorded amount to the tally ticket is based on a unit of one thousand. By custom these people have learned to know that they get so many cents per thousand. They share in it in that way, and you just can't change custom. You would like to change custom at times. It is quite confusing when we start explaining to people who do not know. Even in our record keeping [13] everything is based on cost per thousand.

Now, the vessel itself has shallow draft if designed for the Gulf, so it can operate in shallow waters.

Q You have a quicker drop in the Continental Shelf in the Atlantic?

A Definitely, sir. You have quite a bit of area in the Gulf where you have 12, 15, 18 feet of water for a tremendous distance out from the shore. In the areas in the Atlantic, it is similar, but frequently it drops off immediately. The unit also is peculiar. The mother ship is peculiar in that it has a mast, a tall mast, the top of which is what we call the crow's nest, which is a lookout point from where the captain and the mate

view the schools and determine whe
sufficient fish to justify them mak
actually the putting of the net overbo

Q Before we get into that, is thi
exclusively the province of the cap
[14] A Definitely, sir.

Q The purpose is not only the l
but the determination of whether t
worthy of a set, as you said?

A Yes, sir. They have complet
that. They control it. They have c
they respect the rights of others. In
times there are two boats that ma
mass of fish at one time, and at
They proceed to the fishing groun
ing grounds, that they think are t
ous to them to catch the fish.

Q Are these fishing grounds
in the menhaden industry, so to spe

A Well, they are defined, but
way. I don't think you could really
because it may spread three or fo

Q And it will vary on the day
fish?

A They may catch the fish
[15] may be 50 miles away the
area, or they may be back in the
day. It is not uncommon for ves
wise as much as 200 miles or be
fish or before determining if that
to fish.

Q Would you go ahead and de

A Once the captain has det

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ermined that he is

going to make an attempt to capture the fish, then they lower the purse boats. Now, these purse boats carry the seine.

Q How many purse boats are there?

A There are two involved. They are 30 or 35 feet in length.

Q Are they power launches?

A Yes, sir, mostly gasoline powered. Some of them are Diesel powered. The purse seine varies in size, but normally it is at least 60 feet deep and 1200 to 1500 feet long. It is just a rectangular piece of netting with weights on the bottom and floats on the top. Half of it is stored in each boat, and these two boats are parallel with each other. They run to [16] the area where the fish are and start dropping the seine between them as they circle the fish and come around, and they purse the bottom of the net together and bring the ends of the net back into their purse boats, and then they herd the fish into one section, the section in which the netting is heavier and stronger than the wings of the net, and after they have gotten the fish to that area, they actually purse the net together like a purse and they have the fish captured in it.

Q Does the mother ship then come to the purse boats?

A The captain directs the mother ship.

Q Who is in charge of the purse boats? Does the captain go in one and the mate in the other?

A Yes, sir. The captain is in charge of the operation.

Q How many men will there be in each purse boat?

A It varies, but normally 14 to 16 men in both boats.

Q Divided between the two boats?

[17] A Yes, sir.

Q All right.

A Each man has certain duties based on his particular job. It is more or less a team working. This man knows that he is supposed to pull corks and this man knows that he is supposed to put the rings back on the stand that holds them. This man knows that he is supposed to pull the webbing in, and they work it that way. The captain has naturally the authority, but there are other duties that are done without direction.

Q It is just part of the job and known to be such?

A Yes, sir.

Q Would you pick back up where the seine has been pursed and the captain has given the order for the mother ship to come for the — I suppose the loading operation would be next. Is that correct?

A Right. He signals to the vessel's pilot to bring the vessel alongside. You have the two purse boats with the fish between them, and the boats are moored against [18] the side of the large vessel. The side of the purse seine is tied up to the side of the big vessel. The fish used to be taken out with a dip net. Now they are pumped out with a suction hose. They put a 10-inch suction hose overboard into the net, and they have a system of lifting the net up so that the fish will be near the top.

Q Do they winch it up?

A Yes, sir. They have a strap that goes around the net, and it goes up to the mast.

They have the hydraulic rams that pull it up. It is all done by mechanical means, but it is kind of a team

action. Each man knows what he is supposed to do and he does it. The captain is the master of the vessel, and he is responsible. There may be a time where he won't even go out in the purse boat. He may send the mate and another person out to set the net. Normally he actually directs it.

Q Now, I am sure that the size of the catch will vary on a number of things for one particular set. Normally, how many sets [19] might it require before the captain would terminate the voyage, so to speak?

A He could be lucky enough to catch enough fish in one set to load the vessel.

Q It is rather extraordinary?

A Right. Sometimes they can load a vessel in three sets.

Q Is that about typical?

A No. I would say that maybe six or eight is probably it, and there are many days that they never do load the vessel.

Q This gets into another area. What determines the length of the voyage? Do they automatically stay out until they have loaded, whether it takes one set or 10 sets?

A Well, whatever they determine that their chances are of catching the fish in the area that they are in or whether they should move to another area would determine how long they should stay. They may leave the fishing grounds in the middle of the day if they decide it is no longer attractive enough for them to make a good set of fish. They are [20] liable to come in at 9:00 o'clock in the morning. They are liable to leave at 4:00 and be back to the dock at 9:00, or they may stay until 9:00 that night or until 2:00 o'clock the

next morning, whenever they determine that they have either had all they can carry or that the prospects are such that they don't want to try any longer. They will leave the fishing grounds with fish out there at times if they decide they had enough work for the day.

Q Typically, are the voyages less than two days?

A It used to be strictly a day-by-day operation.

Q They would always return to the dock each day?

A If they caught any fish, they would. You had the problem of deterioration of the product because the fish were not refrigerated. Now, with the refrigeration, they will stay four or five days.

Q You have previously mentioned refrigeration and you said this is one aspect of the larger ships. Prior to refrigeration, they carried no ice?

A No ice.

[21] Q Otherwise, it was a matter of getting the product back to shore before normal processes would cause deterioration?

A Right. Again, if that was in the Atlantic where the water is cold, it would be a delayed action. If it is as cold as it sometimes is in the wintertime, they could stay days. In the Gulf, as hot as it is and as warm as the water is, normally they would return daily or every other day. In other words, they could go out today and not sight any fish, or if the weather conditions were such that they could not catch any fish, if it was two days they didn't catch but just a small catch, say 10,000, which is three or four tons, they would not run four or five or six hours back to the plant, but they would just leave it in the hold and catch the next day and put the fish right on top of those and return the following day. There has been some changes in the

operation in that respect because the quality requirements of the end product have been strengthened. I mean, the [22] customers demand better quality fish meal now.

Q I am going to get back to the particular companies we have involved here and ask some more questions. The boats owned by W. M. Webb, Inc., Carteret, Inc., C. P. Dey, Inc., G. B. L., Inc., Merlin, Inc., Webb Bunker Company, Louisiana Bunkers, Inc., Plaquemines Bunkers, Inc. and Charles S. Wallace, III, Inc., where was their home port during the middle fifties, 1956? Generally, where did they operate out of?

A Out of two Gulf ports, Cameron, Louisiana and Empire, Louisiana. There were two Atlantic ports, Fernandina Beach, Florida, and Morehead City, North Carolina. This covers the scope of where these vessels operated during that period, some at different points and some at all of the points and some only at one of the points.

Q Who owned the docking facilities out of which these boats operated?

A Various companies, none of which owned any [23] vessels themselves.

Q You mean the companies were completely separate from the vessel operations?

A Yes, sir.

Q Was there, however, any relationship by way of stock ownership or otherwise between the persons who owned the boats and the persons who owned the docks, or the companies?

A No definite pattern, but there were cases where one vessel may have —the stock of that corporation may have been owned by someone who owned interest

in a particular plant, but not necessarily in all of the plants or in all of the boats.

Q Now, are we talking about the same thing when we say the plant and the dock?

A Yes, sir.

Q This is all part of the unloading and processing operation?

A Right.

Q Now, would you describe for me as best your current knowledge will permit who owned the four dock plant operations out of which these boats operated?

[24] A Louisiana Menhaden Company at Cameron, Empire Menhaden Company at Empire, Louisiana, Mayport Fisheries Company at Fernandino Beach, Florida, and Wallace Fisheries Company at Morehead City, North Carolina.

Q Did anyone own the controlling industry in Louisiana Menhaden Company?

A I can best answer that by saying the internal revenue people have never tied any of these companies together, and they have tried to tie them together. There hasn't been enough ownership here to justify it for internal revenue purposes to consolidate any of them.

Q Was there a controlling stockholder in Louisiana Menhaden Company?

A There is a combination of people.

Q Who are the persons who control it, so to speak?

A At what time are you talking about?

Q Let's talk about the mid-1950's, 1955 or 1956.

A I will have to go back and check the records. I just don't have that information. It has never been of

an issue before, but to actually tell you I would have to go [25] back and see if I can locate the records at that time to tell you. Basically, it is a Wallace organization.

Q This is what I am getting at. Is Mr. Wallace substantially involved in Louisiana Menhaden?

A Right.

Q Is he substantially involved in Empire Menhaden?

A Yes, sir.

Q What about Mayport Fisheries?

A Yes, sir.

Q And naturally substantially involved —

A Not directly in Mayport Fisheries because Mayport Fisheries Company, back in those days, was owned by a different group. It had been acquired about that time, maybe a little later, by one of these other corporations, so it is a little bit difficult to give you an exact answer on that. He definitely has a major interest in the Wallace Fisheries Company. To give you the complete picture back in the 1950's, that is taxing my brain pretty much to recall what the [26] circumstances were, but there also existed a second plant at Morehead City called Carter Fish & Oil Company, to which some of these vessels delivered fish also.

Q Would it be possible that some of these boats, and let's say a boat operated and owned by W. M. Webb, Inc., might at different times of the year, depending on the season and the run of menhaden, dock and unload at Louisiana Menhaden and then at another time in the year dock and unload at Wallace Fisheries?

A Oh, yes.

Q Otherwise, there was a shifting between the Gulf

Coast and the Atlantic Seaboard operation on occasions?

A Right.

Q Would you describe for me — we had gotten up to the point where we had the fish caught, so to speak, and we have a loaded vessel. It is coming back into the dock. What happens then?

A The fish are unloaded.

Q By what means presently? Do they have [27] mechanical unloaders, big suction devices?

A Pumps, and they are placed in this fish measure we referred to or dump, which is a volume deal. When it is full, it automatically tilts, and that is referred to as a unit. The fish are dumped onto conveyors. They go into the plant where they are processed.

Q Would you describe the processing for me in the plant.

A Well, the fish are unloaded at a higher rate than the capacity of the machinery in the plant can process them, and the overflow goes into what we call a raw box or storage box. The cooking or the processing of the fish consists — it is a continuous process. The fish are first placed in continuous steam screw-type cookers. When they come out of the other end, they have been cooked with steam. The fish then go into horizontal screw-type presses, where the moisture and oil is pressed out, where the press-cake, what we call it at that point, has approximately 55 per cent moisture left [28] in it. Then the body of the fish or press-cake is taken into rotary-type hot-air or steam-type driers, where the moisture is further reduced to nine to 10 per cent. Then the body of the fish then is taken into the scrap house where it is called fish scrap. There is

an additive added, an oxidizing agent, to cut down on the oxidizing of the fat, and the fish is turned to get the heat out of it by shifting it with conveyors. Then it is ground into fish meal or sold as fish scrap and is packaged either in burlap bags, paper bags, or it goes out in bulk. Ninety-nine per cent of it now is shipped as bulk.

The oil and water that is extracted in the presses first goes over vibrating screens. The little bones and the parts that may have sifted through are further separated, and they go back into the presses. The oil and water is combined at that point and called stick water. The stick water goes through decanters in which there is a further separation of the dissolved [29] finds in the water, and this material goes back into the press cake. From this the water goes into centrifuges and the oil and the water is separated. Then the oil is what we call polished. More water is added back to it, and it is polished and heated. We end up with a crude menhaden fish oil. That is the way we market it. The water that is taken from the fish is then further processed either by steam evaporators of some type or hot-air evaporators, and this water which contains from six to nine or 10 per cent dissolved solids is concentrated to a glutinous mass that is liquid, and it is pumped with a consistency of almost Jello. It has about five per cent moisture.

We end up with fish meal that goes into the high protein products for the growth factor for poultry. We have a fish soluable which has basically — basically, it is used for the same purpose except some small part of it is used as a plant fertilizer. The third product is oil, [30] which is crude menhaden oil, and it is presently

sold for export mostly to Europe, where they make margarine out of it. There is some used in the domestic market for paints, rust preventative paints, protective coatings.

Q Do you sell exclusively to — do the fish plants, by whomever they are owned in this group that we have been talking about, do they sell these three products as a raw material for further manufacture by other manufacturing companies?

A Yes, sir.

Q There is no finished product that is sold in the sense of going on a commercial market?

A No, sir.

Q Do these plants operate year-round, or are they dependent, I take it, upon the seasonal aspect of menhaden fishing?

A Yes, sir, seasonal. Naturally, the product may be stored or shipped out on a year-round basis, but back in the 1950's it was definitely a seasonal operation. The product went out as fast as it was [31] manufactured. At the end of the season, within a few weeks or months or so, the plant was closed down and there was no more operation.

Q I am sure that these fish plants were of different sizes. Typically, how large a fleet of boats would one plant service?

A Anywhere from four to 12.

Q Was it typical that a plant would service a fleet of boats that were, by and large, owned in whole or in part by the same interests that owned the plant?

A Not necessarily.

Q That might serve independent boats, too?

A Yes, sir.

Q Are there a number of menhaden boats that are independently owned by investors or what-have-you, and that is the only involvement they have in the menhaden industry is the ownership of just one menhaden boat?

A Back in the 1950's, it was more so than now. There were more then than there are now.

Q The industry is beginnng ito consolidate in the sense that ownership groups now are [32] beginning to integrate their operations from the menhaden boats to the selling of the product?

A Not so much as it is that the economics of it is getting involved in the thing. It is much more difficult today to make a profitable operation due to the scarcity of fish, especially in the Atlantic area. This practically has been a bust-up there for the last four years. Everyone up there is about bankrupt. This year has been the worst year on the Gulf of Mexico ever since we have been in business. We have been down here 21 years. We have importation of fish meal in this country from Peru and Chile and Norway and Canada, South Africa. In the 1950's, the feeding industry had to depend upon 80 or 90 per cent of the fish meal from domestic production. Last year they probably purchased 40 per cent of their uses from domestic production and 60 per cent was imported. The importation of fish meal, particularly from Peru, has just about wrecked the markets of [33] fish meal in this country. The only thing that has saved the industry — I am not giving a speech in that respect to try and impress anyone — but the European economy has — especially West Germany — the markets in Europe are so much better that the fish meal in Peru is not brought into this

country as quick as it was. It is going to West Germany instead.

It hurts us in the other product, fish oil. It was competitive, soybean oil. I should not say competitive, but one affects the other.

Q They are substitute products?

A As the economy in Europe has improved, they don't like to eat fish oil margarine. They rather have soybean oil margarine, so they are paying higher prices for it. They are cutting back the cost they will pay for fish oil. In 1961 or 1962, there was almost a collapse of the industry in this country because of the flooding of our markets with imported fish meal from Peru. If you can visualize that we [34] produce, let's say, 225,000 tons in this country of fish meal, and that has been the average over the last 15 or 20 years, up and down, give or take 25 per cent, regardless of what the effort has been, there has been that much produced. A country that was producing 10,000 tons 10 years ago is now producing a million one hundred thousand tons in Peru alone. They are bringing into this country three to four hundred thousand tons of fish meal a year that they can't put in the European market at a higher price. Europeans will pay more money for their fish meal than buyers will in this country.

Here is another case. They have to substitute soybean oil meal which they have to import from the United States, and naturally soybean oil meal is going to cost more in Europe than it is in this country, so it raises their competitive or substitute product. Therefore, they substitute fish meal at a higher level, and as a result it works its way back [35] that the only material that comes into this country is more or less a

surplus or the dumping grounds for the Peruvian industry.

Q Let me ask you some questions now that I know a little something about the menhaden industry specifically relating to the nine companies that I included in my question a few minutes ago, and if your answer would be different for a particular company, would you point out that difference to me or I will assume that the answer will generally hold true for all companies.

How did you go about selecting a captain for a menhaden boat when a captain's position became open?

A Let me give you a little background on this. I have been in the business all my life. I have never worked for anyone else other than the menhaden industry, and basically this same group of people. A captain's reputation is built on his past performance. Captains naturally are interested in making an arrangement with [36] a boat owner to fish a vessel, a particular vessel, or some vessel at a given point. The approach quite frequently is made — well, the captain will come in and say, "I would like very much to be considered for fishing the boat MARYLAND next year." Well, the owners of the vessel would determine if they would like this particular man, and if they liked him, they would hire him.

Q Now, with respect to the nine companies we are dealing with now, was that a matter for your individual determination as a representative of these owners or did the owners personally involve themselves in this question of captain selection?

A In most cases it was an involvement of the owners. I made recommendations, but they had the right to change them and quite frequently they had other

ideas, too, but sometimes these overtures were made to other people rather than to me.

Q Would it have been typical at any particular point in time that either you or the other persons involved as owners or stock- [37] holders of these companies would have had one or more, two or three captains, who had evidenced interest in being captain of a particular vessel from which they could draw? In other words, was there a pool of available captains?

A Yes, sir.

Q Was there any sort of — did you rely exclusively on their reputations, the captains' reputations ,as a fisherman of a menhaden vesel in making your crew selection?

A Oh, yes. It was a business judgment that was made that this man was capable of doing his part of the job, somewhat influenced by the number of men and the caliber that were available, coupled with the fact that the kind of equipment that you had would demand the attention of a high-caliber captain. In other words, I could not say that every captain was available to every vessel owner. The vessel itself, the size, where it is going to operate, and the relationship with the owner would have some bearing on it. You have competitors in this business, too. It is [38] not only us.

Q Did you take any sort of an application from the captain? Was this a written application, or was it purely an informal contact?

A I have never heard of a written application being taken. I think it is just an oral arrangement. The captain says he is interested, and the owners agree that they will give him the vessel and let him try it. You see, a lot of custom has been brought down. This

thing has been growing for years. In fact, some of these people that we are talking about were in business in 1895.

Q There are a lot of things bearing on the selection of the captain, the terms upon which he works and so forth that are simply custom within the trade that are known both to the company and the captain, so to speak?

A Right.

Q Who makes the decision as to whether a particular boat is going to fish the Gulf Coast grounds or the Atlantic grounds [39] during the months when the fish are running generally in both grounds?

A It would be probably proper to say that the owner makes the decision, but bear in mind that the owner himself has to still rely on the captain to direct and run this vessel for him. For instance, if a company had an option of two places, and this particular captain that was the most suitable and available to him had a preference of where he would like to operate, it would be a definite factor as to where the vessel operated.

Q Otherwise, if an owner could get what he felt was an extraordinary good captain who just happened to live in Morehead City, North Carolina, that might dictate they would fish the Atlantic grounds?

A Yes, sir, definitely so.

Q Were there — what other factors to your knowledge would come into play in determining which ground the boat would be fishing, assuming that the fish were running in both places?

A Well, the two areas involved during this [40] particular period, the most preferable area was to fish in the Gulf of Mexico. There is still the limiting fac-

tors. The owner had to make arrangements with shore facilities to take these fish, and there were years during that period where there were more boats than shore facilities could take and there were times where there were less boats than the shore facilities wanted, the vessel was making money or couldn't make money, or the profit picture was such or the local conditions were such that would govern this.

Q Otherwise, if there was a shortage of plant facilities, the availability of a plant in North Carolina might dictate that they would fish there?

A Definitely so. You can understand that if an owner of a boat did not have a place to deliver his fish, he would have no — now, that is not — that has never been a real problem. Normally, the lack of fish —

Q Is there any competitiveness among the fish [41] plants?

A Definitely, sir.

Q Would you explain to me how that competitiveness manifests itself.

A We are — I say "we are." The owner can make his own arrangements with his captain if he wants. No one can tell him what he can do or can't do. If the man down the road thinks the captain is worth more money to him, he will say, "I will give you a better deal. There is a bonus or a new car for you." There are a lot of ways to do it.

Q What are some of the ways that have come to your attention in the industry that the fish plants have competed with one another in the attracting of good captains?

A Paying them more money, paying them greater bonuses, larger bonuses.

Q Is this payment of bonuses, is this something that is fairly typical in the industry?

A Yes, sir.

Q What is the bonus based on?

A The catch of fish. No fish caught, no money.

Q Generally, is there any customary fashion in [42] the industry in which a compensational arrangement is made between the boat owner and the captain and crew? Is the fish catch split?

A It is a share arrangement.

Q Is there a typical sharing arrangement percentagewise?

A Between the owner of the vessel and the captain?

Q Yes.

A No. There is no relationship to value of product or anything else. It is a matter of what the captain and the owner can get together on, and the captain might say he can fish and deliver the fish to the owner for X number of dollars per unit and pennies per unit bonus, and this can vary from year to year. It can vary between boats and owners. It can vary between men in the crew and the captain. Normally speaking, the arrangement is an arrangement which is entered into between the captain and the owner.

Q So far as the crew is concerned, their arrangement is private with the captain?

[43] A Ninety-nine times out of a hundred the owners don't even know the names of the people or have never seen them on the boats other than the captain. Sometimes not even the engineer or the mate or the pilot is known. All of these dealings are strictly with the captain of the vessel. If he can fish with 17 men instead of 19 men, and he wants to take the money that

was paid to the other two men and distribute it among the crew or keep it all for himself or however he wants to do it, that is quite permissible. In fact, it's the way it is done. It has been that way since the beginning of time.

Q So when the captain and the owners start bargaining with respect to compensation, that is all that is involved, just the captain and the owner?

A Yes, sir.

Q What about the crew members?

A They are not even considered.

Q Their arrangement is with the captain?

A Right.

Q Did you indicate that the typical bargain that [44] is arrived at between the captain and the boat owner would be for a certain dollar figure plus a bonus based on the catch?

A Right.

Q How would this dollar figure be arrived at? Would it, too, be geared to the catch?

A No, sir. It is geared to competition and what the captain thinks he can get the men to work for or what he can work for. Competition is the biggest thing that controls it. If the man down the road is paying his captain $3.00 a thousand for fish, you are going to have a hell of a time to have your man go for you for $2.25 or $2.75.

Q Is this dollar figure a dollar figure per thousand of catch?

A No guarantee whatsoever.

Q If he takes the boat out and comes back empty, he gets nothing?

A If he goes out every day for six months and

comes back empty, he doesn't get a dime. He has to catch fish.

Q Well, there is a certain dollar figure per [45] thousand, and I believe you also indicated there is a bonus?

A Right.

Q Now, how is this bonus geared?

A During the years, it has been quite — it has been a graduating thing based on — the whole thing is designed to create an incentive to catch more fish. In other words, a captain may be told that if he catches 10 million fish, his bonus will be 10 cents a thousand. He may be told that if he catches from 10 to 12 million fish, his bonus on these fish will be 15 cents a thousand. He may be told that if he catches from 12 to 15 million fish, his bonus would be 20 cents a thousand. That is the way it has been done. It has been done on a flat basis so much per thousand. It has fluctuated, of course. The circumstances control it, how healthy is the industry, how good are the prospects of catching the fish, how good is the ability of the men to catch the fish, and all of these things enter into [46] it.

Q Talking about one of these factors, how good is the potential of the men to catch the fish, would this bonus arrangement vary depending on the captain? Is this one of the places he would compete?

A This used to be more of a factor around the 1950's. It is not quite a factor now. They got to the point that was the breaking point, that they were making all of the money. Out of this came a suggested pay division among the crew members, just a suggested pay rate.

Q By whom was the suggestion — the owners?

A Yes, sir, the owners and the captains consulting together. We tried to produce harmony among the crews.

Q How was the arrangement, to your knowledge, arrived at between the captain and his crew?

A Strictly between him and his man. If that man would go to work for him for two cents a thousand or 10 cents, if he wanted to hire him that way, he could do it. That is exaggerated, of course, that [47] figure, but it is the captain's arrangement. If there is a new man and he figures he can get him with less money, he will do it.

Q What is the typical sized crew?

A Back in the 1950's, it was roughly 20 to 24 men. It has now been reduced to 17 to 18.

Q What has this reduction been brought about by?

A We have put in power blocks to pull the nets down and lifting devices for lifting the nets, a lot of that type of thing, mechanical means.

Q Within this crew which will be a full complement for the boat, are there some very different type of job classifications?

A Well, in some crews more than others, yes. Basically, you have a mate for certain duties, a pilot for certain duties, a cook for certain duties, an engineer for certain duties. In some instances, a captain will carry a second engineer and a second pilot who will also double as a bunt puller or a seine setter. It goes according to the size of the vessel and [48] the way the vessel is equipped. There are definitely different categories, but there is nothing fixed about it. It isn't

uncommon for a captain to go to sea with an engineer that never goes in the engine room. He himself is capable of performing the duties of the engineer or seeing that the engines are properly run.

Q Would these different divisions of labor, so to speak, be reflected in the captain's arrangement with them insofar as pay is concerned?

A Yes, sir.

Q What was the — you mentioned just a minute ago that there was at least one point in time when there was a suggested compensation scale to the captain for the purpose of the crew. What brought this about?

A I don't know how to answer that, what brought it about. If you were to approach any fisherman fishing out of Cameron, Louisiana, or Morgan City, Louisiana, today, and you were to talk to a bunt puller, the chances are that that bunt puller's pay would be somewhere in the [49] range of nine to 10 cents. Now, you can readily recognize the fact that if one captain paid 10 cents to everyone or 11 cents and reduced his pay, that it would create disharmony among the rest of the crews, where the other captains would say, "I am not going to pay you that much money." So, it was only a matter of trying to produce harmony that any such suggested rate was ever made.

Q This suggested rate, was this something that one particular fish plant did, or did all of them do it, or how widespread was this?

A I don't know how other companies did it or whether they did it. I am talking about something now that is — there is no written record in some instances of how it was done, but this sort of — like if you are

running a filling station and the attendants are normally paid $1.50 per hour and the man across the street is paying $1.50 an hour. If you need a man, you will have to start paying $1.50 an hour if you want to get a man to work for [50] you. This is not a fixed requirement. The captain could still pay a man for his services in connection with the taking of the fish, any amount. In fact, he could give — he could pay a man more money than he himself was making, and that has been done, especially if there is a new captain, a young one that is coming up, and he wants to get his foot in the door. He may organize a crew and he may pay the mate, the pilot, and the engineer as much money as he himself would draw, just to get established, you see. He may pay the seine setter a cent more than he normally would be paid, and he may get a man to work for him that he calls an engineer, but in reality he doesn't know how to start and stop an automobile much less what they are doing. He may make a deal with a man to go for five cents a thousand less than what the man on the next boat is making.

Q Did you indicate this matter of crew selection and organization is exclusively the captain's province?

[51] A It is, definitely, 100 per cent.

Q Have there, to your memory, been any occasions in which either you as boat manager or one of the owners indicated to a captain the desire to have a particular man discharged from a crew because of some problem with him?

A I can't recall of any incident of this ever happening. I am not saying that it has not happened, I am sure that if an ex-convict found his way into the group and the authorities approached the owner and said,

"You better get rid of that boy, we don't like him around," the captain would probably be called in and the owner would say, "Listen, Bobo is an undesirable character. He is suspected of being a peeping Tom up the road. You had better get rid of him or do something about it." That would be something between the captain and the boat owner. In fact, it is almost a custom and a law of the sea that if the owner of the vessel is on the vessel at sea, it doesn't make a difference what goes on, [52] the master of the vessel is the captain and he may be 10 years or 20 years younger than the owner and he may be a new man, but it is a law that he has control of the vessel. Now, you can readily recognize that he — his efforts are directed to please the owner, but at the same time he directs the operation of the vessel. He says what time they are going to leave the dock in the morning, what direction they are going in, and there is no one who tells him when to come back or when to leave. You can surely recognize the fact if he didn't leave and he didn't catch any fish, there would be repercussions, but at the same time it is a captain-owner relationship, and the captain has — well, you choose these men based on their reputation. These men do not get to be captains overnight. In fact, it used to be a custom that they used to be in their late fifties or sixties before they had the opportunity of becoming a captain. This is a job people work years and years for. There [53] are men that work 10 to 15 years as mates and pilots just waiting for the opportunity to become a captain, when he can have his own boat. I think this is true not only in the menhaden industry, but it is also true in the shrimping industry, in the tuna industry, throughout, and these men that

follow the sea, it is something that is grown in them. I wouldn't dare go out there myself. They couldn't hire me at any price for the way they live.

Q Is there a substantial degree of turnover in crew personnel, or do the captains manage to keep the same crew together for a period of time?

A This year it has been horrible.

Q Once they organize a crew, will they tend to fish the entire season with that crew?

A Quite frequently, yes.

Q I believe you indicated that the arrangement between the owner and the captain was entirely oral? In other words, there was no written contract between the boat owner and the captain?

[54] A No, sir, no formal contract at all.

Q What was the understanding between the owners and the captains with respect to the duration of his tenure as captain?

A Normally, it is made on a seasonal basis.

Q Is it indicated to the captain by the owner that as long as his performance is satisfactory, he will fish the boat for that season?

A Right.

Q Is it also understood that he can be terminated at the end of any day's work, so to speak, if his performance is not satisfactory?

A That is correct.

Q As a practical matter, does his employment generally continue for the season?

A It generally continues for the season. There are cases where the captain will be unable to maintain a crew, and the captain will have to say, "I can't continue fishing the vessel, my crew has left, and I can't

secure another crew." In that case, there is a termination. That isn't uncommon, especially when the [55] fishing is poor and the men migrate to other jobs.

Q In other words, it has got to be a paying proposition for them, too, in order for the captain to keep his crew organized?

A Right.

Q Well, will the boat owner sometimes terminate a captain because of a failure to produce adequately?

A Oh, yes.

Q What sort of — typically, in the boats you have been involved with, what sort of a trial period will an owner endure before he arrives at this decision?

A I think that the owner would like very much to to be able to shorten the period, but there are other factors. What are you going to do if you don't have this bum? The next bum is worse than he is. Normally, a captain is terminated or a vessel is taken away from him because of lack of production after the season is over with.

Q Otherwise, you normally endure a boat captain for one season?

[56] A Unless there happens to be another man that comes along that is ready because of some relationship with some other place, and he is ready to take your vessel.

Q Otherwise, as a practical matter, you have the problem of finding a captain with an organized crew ready to go when you terminate a captain?

A That is just good business. You don't take one of your vessels and keep it tied up at the dock for the lack of a captain.

Q It is better to have a bum fishing it than no one fishing it at all. Is that right?

A That is right. Sometimes it is questionable as to whether it is good business, but once the season is started, normally, the season is completed, unless the conditions get so bad that either through election of the captain that he terminates the contract — that could happen. It has happened this year. We have had five or six terminate this particular year. It is all tied in with the fact of the man's ability to get a crew. You cannot operate one of these [57] boats with 15 men. You can have 15 of the best men there is, but you have to have 17 or 18 as a team. It has to be that way.

Q What other reasons for a captain's termination have occurred other than an inability to produce at an adequate level?

A Health.

Q Have you had disciplinary problems to cause termination of a particular captain?

A Not particularly.

Q Do you recall any other specific reasons for what I will call "involuntary termination," where the captain wanted to continue and you said, "No, I am taking the boat away from you," other than an inability to produce?

A I can't recall of any instance where the man — we have been lucky that the caliber of the captains has been such that they didn't get in jail or weren't accused of raping somebody or something, but that has been a factor in some instances in our competitors' operations. It is something that could be terminated [58] tonight if the owner of the vessel felt that the captain wasn't best suited. He could call the cap-

tain in and say, "Listen, I don't think that you are performing properly and you are not producing. You bring the papers to the office, and that is the end of the operation." By the same token, the captain can call in and say, "I am bringing the papers in, I don't want any more of this." It is kind of a loose way of doing things, but that is the way it is done.

Q Would you describe for me how a settlement is made. Let me preface that with this: Is a settlement made after each unloading operation?

A The captain allocates to the various crew members, including himself, a division of this particular unit of dollars that is going to be paid for that particular unit of fish. Now, that is a trip-by-trip determination. Now, that is consolidated into a period of time. You don't do it every time the boat comes [59] in, but you may have 17 men participating in this particular catch today and tonight two of those men might leave the vessel. The captain might rehire two more and the next day you have 17 men but different men.

Q Participating maybe on a different basis?

A Right.

Q Now, what sort of paper work does the company go through at the end of each unloading?

A At the end of each unloading, the company doesn't actually do anything other than the shore facility gives a tally sheet to some person on the vessel that may be the captain or the mate or somebody else, recording the fact that he has unloaded x number of thousands of fish.

Q Is there a price indicated?

A No, sir.

Q There is no price indicated?

A No, sir. The captain prepares a daily — or some member of his crew prepares it for him. Some of the captains can't even read. That is amazing. Some of your better ones, they have the instinct of [60] which way the wind is going to blow and which way the fish are going to move and how to catch the fish. You have a different element getting into it now than there used to be. Quite a few of these people are colored people.

Q You were describing for me the record maintained daily by a member of the crew.

A The captain turns in biweekly the man's name, Social Security number, number of fish he caught and participated in, and the rate he is being paid, and that may vary from day to day.

Q You mean there is someone on the boat, either the captain or someone in the crew designated by the captain, who maintains this daily log and turns it in to you biweekly?

A Whether it is prepared daily or not, I do not know.

Q It is on a daily basis?

A Every unloading catch is designated as to how it shall be distributed, and that division varies among different men even to the point that some man may today be [61] paid nine cents and he may push the captain for an extra penny, and tomorrow the captain may pay him 10 cents a thousand. There is a great variance in that. The captain determines all of this.

Q And a summary sheet is given to you biweekly?

A Yes, sir.

Q It indicates the name, Social Security number, amount, and the price per unit at which each one of the men participate?

A Yes, sir.

Q And somebody for the company has to question in reconciling these filings to determine if there is not an over-participation?

A The unit price is never exceeded. In other words, if the unit — if the arrangement between the owner and the captain is $3.00, if he adds it up as $3.01, that comes off the captain's pay.

Q Then does the company issue — I say the company, the owner — checks biweekly?

A Right.

Q To each of the crew members based on this tally sheet that is given you?

[62] A Right.

Q What sort of records do each of these boat owners maintain wtih respect to these earnings?

A Normal payroll compilations.

Q Do you have a separate history sheet for each crew member showing the —

A Well, first is the separate one for each vessel. If a company owns two vessels, there is a separate one for each vessel. The amounts are individually posted to the individual payroll records of the individuals.

Q Otherwise, ultimately you have an individual ledger card showing all payments made to each crew member?

A Right. I understand in some competitors' operations, that is not even done by the company. It is done by the captain. The captain maintains his own clerical help to prepare the records. In our particular case, it is done.

Q With respect to all of the boats that we have been talking about?

A Yes, sir.

[63] Q Is it understood that the captain will — is it understood between the boat owner and the captain that all of the catch will be unloaded at a particular dock? Does the captain have any discretion as to where the firsh are unloaded?

A The normal pattern is a vessel fishing out of Empire will unload the fish at a given point in Empire. Now, it has happened when the captain would catch half a load of fish and he would be closer to another plant, say he would be closer to Cameron than to Empire, and then he would go into the Cameron plant and unload. Here again, it is a —

Q Is it understood in advance that he has this authority from the boat owner?

A Projecting my thinknig and answering back to the mid-fifties, I would say that it is not as probable as it is today. Today there is a definite arrangement whereby the captain can go into Cameron or Empire, anywhere he wants to go, with his fish. Today, if the captain of a vessel is off of here fishing (indicating), if he elected [64] to continue into here (indicating) to unload or come back here (indicating), he has — he can do it if he wants to.

Q You indicated this is more true today than it was in the mid-fifties?

A Right.

Q Was there —

A It was done at that time, but not quite as much as it is done now because of the range of the vessels. The range of these vessels is greater now and the scarcity of the fish is more of a factor.

Q Was the captain obliged to check back by telephone or something with the owner or someone on be-

half of the owner before unloading at what I will designate as a foreign fish plant, in the mid-fifties?

A Not necessarily. Here again, it is a relationship between the captain and the owner. Frankly, sometimes the captain actually ran the business. Some captains may be given more authority than other captains, as far as doing certain things. It is a matter of experience or whether the man is [65] capable of rendering the best decision.

Q How was the owner compensated for the catch where the catch was sold at or unloaded at a different fish plant?

A By arrangement with that particular processing plant, a prior arrangement.

Q Otherwise, it would have been a matter of prior arrangement?

A We have unloaded competitive boats at our plant without any prior arrangement.

Q As a matter of bargaining for price?

A This is a small industry by numbers. Everyone knows everyone else. Where I do a favor for you today, you may do one for me tomorrow. There may be a breakdown of a plant where the unloading euipment is inoperative, and you have the fish on hand and you have to get rid of them. There have been times when captains have taken fish into a competitors plant and unloaded them. It is similar in many ways, very similar to the way the shrimping operation is run, but not quite as — well, there are not as many menhaden plants.

[66] Q Doesn't the owner of the fish plant — he is interested in keeping his fish plant operating, isn't he?

A Yes, sir.

Q Doesn't he, at least to some degree, indicate to the captains that he wants enough fish back there to keep his fish plant operating? Is this idea communicated to the captains at all?

A Well, officially, I don't think so; by custom, I think it is. The normal procedure is if you operate out of a certain port, you go into that port to unload your fish.

Q What items of costs are there insofar as a menhaden operation is concerned that are variable with the trip? I know there have to be groceries bought. There is fuel. What else is there besides groceries and fuel that will be an item of cost on a voyage?

A Well, naturally, the supplies, which are limited to oil and lubricating and netting and rope and —

Q Who buys the groceries?

A The captain and the crew.

[67] Q Do they buy the groceries but the bill comes to the company?

A Right.

Q And this item is charged to them at settlement time?

A Right. The only time the company ever pays any food bill is when a crew has abandoned the vessel and leaves it all owing.

Q Are there any particular places designated by the boat owner or you on behalf of the boat owner for purchases to be made?

A We kind of encourage the boats to split the business among the local suppliers. It is good public relations. Beyond that, if all of them wanted to trade at one store, they can all do it. If they want to buy part

from this one and part from that one, they can do that.

Q Who pays for the fuel and what I will refer to as other supplies? Does the company? I am referring to the other supplies like lubrication, —

A The company.

Q Who determines how much fuel is going to be taken on?

[68] A The captain. They just fill the tanks from whatever source is available, whether it be at the plant or an independent dock.

Q Who is responsible for the netting?

A In what way?

Q Let's assume that a seine is — do you have occasion where a seine is badly damaged?

A Oh, yes.

Q I take it from your sigh that you indicated this is a pretty substantial item as far as expense.

A Yes, sir.

Q Who bears the financial responsibility for a damaged seine?

A The company ends up paying it, but the captain is brought to task if he uses poor judgment in the way he treats that particular seine. He determines the condition of the seine, whether it should be repaired or replaced.

Q The captain?

A Yes, sir. The crew sometimes gets involved in it. They might say they don't want that seine to fish with, that they want another one.

[69] Q Otherwise, somebody might say, "Look, if you don't get us a new seine, I will quit and go on somebody else's boat"?

A Yes, sir. They use every tactic in the world to get what they want, but you have to use good business judgment.

Q What does one of these seines cost?

A Fully equipped, $12,000.00 or $13,000.00.

Q How long will a seine normally last? Would you say one season or more?

A Anywhere from 20 minutes to — well, with the synthetic, we do a lot of repairing that we didn't used to do. Sometimes a seine would last one season, and sometimes it wouldn't last a full season because it was a cotton net. If they didn't properly maintain it, it would deteriorate in two or three days. I would say they have an average life now of maybe — here again, times have changed. We are using different kinds of netting. We are going to lighter-weight netting and bigger nets in an effort to cover greater areas. I will say a year, a year and a half.

Q Where do you obtain these nets?

[70] A Where?

Q Yes. Do you make them yourself?

A No, sir. We buy the netting — well, this varies, too. We are using some Japanese netting now. We have some from U. S. Net & Twine. There is one up in Tennessee, but I can't remember the name now. Most of the nets are simple. They are bought and made up and put together by these seine men, and the boat companies pay for it.

Q Now, you indicated that the ultimate financial responsibility for the net is the boat owners?

A Yes, sir.

Q Have you had — do you recall an occasion where a captain was discharged or terminated by reason of

what the boat owner concluded was irresponsible conduct with respect to the net?

A When you draw specifics like that, it is difficult for me to — I can't recall any particular instance where a captain was discharged because of that. That may have been a factor with other factors.

[71] Q But while the owner was ultimately responsible financially, it was a matter of some discussion between him and the captain perhaps when a net was damaged, a seine was damaged?

A Well, the captain has pretty good — he is pretty lenient in that respect. After all, he is on the scene of what is going on, and his judgment is not questioned as to whether he sets the net when it is too stormy or whether it was not. The fact is some of these men are more daredevil than others. They will put the boats overboard when the weather is bad. They will lose a purse boat and lose a seine, but there have been times when they actually lost men. You don't fire a man because of his judgment, as long as he thought what he did was right. It has happened to some of the better captains as well as to some of the poorer ones by reputation. The captain really runs the show out there.

Q You mentioned the possibility of losing a purse boat as well. I take it the two purse boats are part and parcel of an equipped [72] menhaden boat, and this, too, is the responsiblity of the boat owner?

A Right, just like the stove in the galley is part of the equipment.

Q Is there any equipment that is furnished by the captain and crew members that they utilize in the course of the fishing operations?

A Their own personal foul weather gear, they furnish that.

Q Who furnished the cooking utensils?

A The boat owner. That is generally the practice, but there is nothing wrong if a cook wants to go buy a particular type of pot. If he wants to buy it for himself, he can do it. If the captain likes the toast from the toaster rather than from the oven, he has the right to get a toaster. Normally, the vessels are equipped by the owner. The equipment for the men, the oilskins and raincoats, that is all their responsibility. They can buy it wherever they want to. If they don't want it, they don't have to buy it.

Q Is the boat owner responsible for all boat [73] repairs?

A Yes, sir.

Q You mentioned occasionally a man might even be lost overboard. Have you had any claims made against these companies, the boat owners, by reason of a loss of life or a limb?

MR. LYMAN:

I object to that question as immaterial.

A To specifically state a specific instance where a man was lost at sea, that would be hard to say. You don't even have to lose a man at sea for someone to file a suit against you. I am sued personally for everything that happens. It doesn't make a difference what it is. If a man falls off a truck on the way home, they sue you. This Jones Act is extended to mean everything. They are seamen when they are on our boats.

BY MR. WATERS:

Q You have then had suits filed against you with respect to personal injuries that have occurred in the Menhaden operation?

A Yes, sir, and the boat owner carries liability insurance to protect himself against any [74] kind of accident.

Q Does your P & I insurance cover those claims?

A Yes, sir.

MR. LYMAN:

I just want to put a standing objection in the record that all of these insurance questions are immaterial.

BY MR. WATERS:

Q Have you had claims as well for Maintenance and Cure?

A Oh, yes. There has been an increasing trend in recent years, whether you extend it back to the mid-1950's, in which there has been more pursuing of the boat owner by alleged or otherwise injuries of crew members — a lot of times the boat owner didn't know they were on the vessel. If the man is reported by the captain — if the captain reports that a man has been injured on a vessel, the normal procedure is that the man be given first aid, put in the hospital, either the United States Public Health Service Hospital or some other hospital, and there have been times when Maintenance and Cure has been demanded, but times it [75] hasn't been. Sometimes the man was returned to duty without any payments being made. It is nothing definite. There is no fixed rate or otherwise.

Q There is no fixed rate for Maintenance and Cure?

A It runs anywhere from the — the demand is as low as $5.00 a day up to as high as $8.00 a day. Back in this period of time, I think it was $3.00 to $5.00, somewhere along in there.

Q Have these demands been generally made against the boat owners rather than the captains?

A Well, these demands — it is amazing how some of these things get brought into focus. Most of the time the men working on the boats will make the demand on the boat. That is usually the practice. They will make this demand on the boat and the boat owner, not knowing who the boat owner is. It is amazing, they don't even know who they are. They will make the demand on the captain. Somewhere along the line they will pick up my name, and put me in it, and pick up some other owner and put his name in it. Naturally, the responsibility [76] ends back with the insurance carrier, the ones handling the coverage.

MR. WATERS:

Let's have a luncheon break.

MR. LYMAN:

(Whereupon, a luncheon recess was taken.)

AFTER THE RECESS:

BY MR. WATERS:

Q Mr. Styron, did any of the boat owners ever advance money to the captain or the crew members prior to the trip?

A Yes, sir.

Q Was there any set policy in this regard, or was it an individual determination every time?

A The best way to answer your question would be to say it was an individual determination.

Q Would the owners advance money to a crew member as well as to a captain?

A Normally, to the captain, who in turn advanced the money or gave the money to a crew member. In every instance, the captain would have to sign a responsibility slip for the crew member. In other words, a [77] crew member couldn't go around the captain to the owner and ask for an advance and get it. It was only with the captain's approval and with the captain being held responsible for the payment.

Q As far as any advance to a crew member, the captain would be responsible for the repayment?

A Right.

Q Did the company or the boat owners have any work rules as such that were made known to the captains to be followed in pursuing the fishing of the menhaden boat?

A No, sir.

Q Were there, to your knowledge, any rules not just governing work but governing treatment to be made of the boat and so forth?

A I don't believe I quite understand the question. Do you mean as to how you bring the boat to the dock and tie it up, things like that?

Q Things of this general nature.

A Once the boat is assigned to the captain, it is the captain's responsibility as master of the vessel to see that it is properly [78] tied, manned, watched, properly pumped out, properly — in fact, he has the right to

say this vessel is not seaworthy, and we have to have it repaired. The captain has that responsibility. If there was an engine not working, it was the captain's responsibility to see that it was reported. He didn't do the repair work to it, but he didn't have to go to the — he didn't have to get permission when to leave the dock or when to come back or whether he should go because of the weather conditions or not. That was strictly his decision. That is generally throughout the whole industry.

Q Did the — does the company or the — I keep referring to the company, and I mean the boat owners — make any desire known to the captains as to the size of the crew?

A Back in that period of time, the limiting factor, the number of men that was required, was the captain could carry 23, 24, 25, 28, or 21, any number that he felt that he could pay. There had been a practice evolved from this freedom of operation where the [79] crew would determine that if they had two extra men, they could catch more fish, and they would in turn — they themselves would share in the cost of the extra men. The owners didn't say you have to carry 21 men or 24 or 23 or 22, buf the limiting factor was the — it is really a custom and they didn't deviate too much from it. If 24 men were accepted as being a crew, generally 24 men was carried. In an effort to outdo or better production, some captains would carry 25 men. In an instance where he felt there was a possibility of one of his crew members maybe not continuing the full season with him, he may take an extra man a week ahead of time anticipating this man was not going to be available for duty, and these people — sometimes

they just don't show up for the next trip, you know. Sometimes the policy of a captain would be that he would carry more men than another captain would carry.

Q There is no minimum crew that was required from the boat owners' point of view?

A No, sir.

[80] Q I appreciate that while there may be some turnover in crews, that generally there is a, I suppose, policy of experienced fishermen to draw from in organizing a crew. How much skill does it take from the worker's point of view? Are they people that you can start out at a completely inexperienced level at some function on the boat and bring along in training a crew?

A Yes, sir. The best way to explain that is that if a captain had, let's say, 80 per cent experienced men, he could probably take the 20 per cent not experienced and fit them in and gradually train them to the team operation. If he had 90 per cent and 10 per cent, something like that, that would work out just as well. That is the way new men were recruited. You could not take a fully green crew and put them on the boat. They never would get a net back in or out. It would be impossible. There is a certain amount of experience that qualifies them for the ability to set the seine or to manipulate the equipment that [81] is necessary for bringing it back in, even more so now than it used to be because it is a much larger netting now. There is a definite skill in this operation. The success of a crew is based on how quick they can get from their quarters or wherever they are into the purse boats, and get the purse boats in the water and around the fish. It is just

like a fire drill, like practicing to put out a fire somewhere. Everyone knows where to go to get the ladder and the hose and make the connection and the different things, and they pride themselves in that. They time themselves from the time the captain says lower away. They time themselves as to how soon they can get that boat in the water and around the fish. Some captains have trained crews that — there is a real amount of pride in the fact that they can encompass the fish so quickly. It pays off for them. You don't do this in a fully inexperienced crew. You could put one or two in the crew and not materially impair the operation, but there is a definite limit to [82] how many you could put in there.

Q With regard to the crew members, I suppose there are varying skill levels?

A Right.

Q How long does a man normally engage in menhaden fishing before he could qualify as a mate?

A That is difficult to answer because I don't — the qualifications of a mate is twofold, not only in his ability to properly rig and keep the vessel rigged — I am talking about with the ropes and the different things. He has to be able to assist in other things, like keeping the crew in good spirits, I mean, keeping them in harmony. Most of these captains are white. Most of the mates are colored. Most of the crew members are colored. The mate is more or less a liaison man between the captain and the — plus the fact that some mates are stronger men on some boats than they are on others. Some of them would never make a mate. We have people on some of the boats for 20 years pulling bunt. That is all they want to do, and that is all they

are capable of doing. A man may come from [83] the woods of northern Mississippi. If he has a strong back and is an intelligent chap, he may, within a two or three-year period, become a mate on a boat. Here again the requirements of a mate have changed materially in the years. It used to be a mate had to mend net. He used to know how to cut a piece of net out and put another piece of net in. Today they don't think of doing such a thing. You have to have a man on the shore. There is no such thing as fixing it himself. It used to be every man in the crew had to be able to mend net.

Q Does the captain and crew have any responsibility towards the vessel while it is in port?

A The captain is completely responsible to the owner for the vessel. Now, how he gets the vessel – how he keeps it properly watched or moored varies. He may have a pilot who he relies on to do it who lives on the boat, or it may be his engineer that he will rely on to do it, or maybe a key deck man that would do it. It is a matter of how the captain arranges it. [84] Sometimes the captain is the first man to hit the dock when the vessel ties up, and the vessel is put to the unloading pump and unloaded and moved and moored and prepared for the return voyage to go to sea while the captain is gone. This can be done by the mate or the pilot or the engineer of a combination of any two of them.

Q How long are these boats in port between voyages, between trips?

A During the heavy operating season, they just come right in and unload. Whatever time it requires for them to get back to the fishing grounds, wherever

the captain determines where he is going, that determines when he will leave. They may come in at dark tonight, and he knows that he is fourth in position to be unloaded. It could be the vessel would be unloaded at 12:00 o'clock at night. He may tell the crew, "Be here at 12:30, and we will leave," or he may say, "Be here at 4:30 in the morning." He may say, "Just as soon as we get unloaded we will leave." He [85] may hold them on duty right through the whole time. If it happens to be on a Friday night and Saturday is the next day's payday, he says, "Be here Sunday night at 12:00 o'clock."

Q Actually, port time, as long as the vessel is in operating condition, is very short during the season?

A Normally, yes, except when the weather is bad and sometimes they stay in for a solid week. The vessel would be tied up at the dock in bad weather.

Q Do you rely or does the boat owner rely exclusively on the captain's judgment as to when the weather is sufficient for the boat to go out?

A Yes, sir.

Q What do the captains do in the off season? They have no relationship with the owners at all in the off season?

A They live a life of leisure, draw their unemployment. That is a crime, too. I am very much against that. In six months these men are going to make $20,000.00 or $18,000.00, and they go down and draw [86] their unemployment during the six months because there are no captains' jobs in menhaden fishing available to them. Under the unemployment laws, they have to pay them.

Q They have no position with you as boat owner?

A No, sir, they have no responsibility other than their vessel.

Q Is it at least tacitly understood between boat owner and captain that a satisfactory performance this season will keep his position as captain for the next season, if there are no substantial intervening factors? Do they carry over between seasons, or do you always go out looking for a new captain at the end of the season?

A Regardless of how good a captain is, regardless of how long he has been employed or re-employed, his agreement or arrangement with the owner terminates at the end of the fishing season. He may have been fishing in the fleet for 20 years, and at the end of the 21st year he may not have a boat, or he may have been fishing two years and [87] he may not have a boat.

Q Is there a substantial carry-over between seasons, as a practical matter, or is there a good deal of turnover?

A It varies from year to year. Sometimes there is as much as 80 per cent re-employment, but sometimes it drops down as low as 50 per cent. There have been cases where it has been as much as a complete return, but I would say it —just guessing, if a man performs well, produces well, the chances are he will be re-employed.

Q Is there any switching around of captains and crews among boats that are owned by the same owner? In other words, if a company, for instance W. M. Webb, Inc., owned two boats during the period we have here, I assume that one of the boats was probably larger than the other one?

A You are speaking of the WEBB and the SEA HAWK.

Q The SEA HAWK appears to be the more expensive one. Would there be occasions when the owner would shift the captain from a smaller boat to a larger boat, if that boat came without a crew?

[88] A That would be possible, but the chances are it is going to be the reverse. The smaller one is the one less equipped by comparison.

Q Have you had occasion in which one of these boat owners that we are dealing with here brought a new vessel into the fleet?

A Yes, sir.

Q How was the captain selected for that vessel; one that was shipping on another of the owner's boats?

A He could be a completely outside man who is brought in. The owner always attempts to get the best material, and one of the factors that controls his ability to get the best man is the kind of equipment, and you can readily recognize if a new piece of equipment is put to sea and it is superior to the average, there is going to be a greater interest from all captains to take the vessel. I think this holds true in all menhaden operations. The captains seem to be trying to improve themselves, and the captains in other fleets or in other ports are trying to get better offers from us. At the same time, [89] men working with us are trying to get better offers from others, and we may have five, 10 units that are going to be manned, and there may be 20 captains asking for these particular boats. The owner naturally has a good relationship — that is one thing in our industry, we don't raid everybody's else's fleet. It is just good business not to do it because he can

raid you. There are captains that leave our fleet and go to our competitors, and there are captains that will leave inter-company. A captain may leave one vessel and make a deal with the owner of another one. It has been done.

Q I was just wondering if there was any preference shown to a particular captain in selecting him for a new vessel.

A I can only say that if that man is better qualified in the opinion of the owner than anyone else, yes. The control is which is the better man. When you have a new vessel, you have a new investment. Every time it is bigger and bigger and bigger. The owner of that vessel has to get the [90] best man that he can get. One owner may like a particular captain because he has always cooperated with him and has always produced, and he may be partial to him, but it is still business. The selection is made on the basis of what would be the best business venture for the owner.

Q You have indicated that generally the captain decides when and where to fish. Are there particular places made known to the captains that they are not to fish? For instance, let's take the Maryland shoreline.

A Any area that is restricted, the owner makes darn certain that he tells his captain that that is a restricted area because he doesn't want to be fined and imprisoned. The captain for Charles Wallace, III was caught inside of Sabine jetty within three quarters of a mile of the jetty August, last August. They put them all in jail in Beaumont, captain and all. They took them off the boat. It is kind of hard when you are out there. You see, there is an imaginary line, and it is not buoyed off. [90a] You can fish within a half mile

of the beach, but you can't fish within three quarters of a mile of the jetty, and here is a school of fish, 1,000 tons of fish, in it, and you have been running for three or four days and haven't caught anything, and here is a mass of boats behind you. You know that if you don't get on them, one of the others is going to do it. The captain says he will take a chance, but it was the wrong thing for him to do. Just as soon as he put the net around the fish, there was a boarding boat on them.

Q What sort of disciplinary action did the authorities take other than putting the captain and crew in jail? Did they confiscate the catch?

A They did. I had a hassle with a competitor of ours that took the fish and unloaded them, too. I thought it was the most unfair thing in my life, to make money at my expense and my poor luck.

Q A competitor of yours bought the fish from the state?

A Yes, sir. I gave him hell, though, I will say [91] that. That is drawing a line too close. In other words, between a half mile and three quarters of a mile, when you are at sea, how can they tell? I think that the captain, if I would have been in his place, I think I probably would have done the same thing he did.

Q Was there any — how did you get your boat back?

A The boat was released immediately after they unloaded the fish off it.

Q What happened to the crew?

A All the men were fined.

Q Who paid those fines?

A Well, basically, they themselves paid them. They were paid and charged to them, and some of them were able to pay the fines and some of them weren't.

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Some of them ended up — the company ended up with bad accounts. This is one thing that specifically is understood, if you get fined for violating a law, it is at your expense. If these captains get fined for violating a law of the sea, it is their expense. Now, that doesn't hold true that you can do it that way. You have to get the boat back to [92] operate. You have $200,000.00 worth of investment, and you don't hold back $200.00. You have to go in and pay it for them and charge it to them and hope to get your money back from them. In most cases, it is a rare thing that ever happens like that. That is the only instance I have ever heard of happening to us, and we have been in business in Louisiana since 1945.

Q These menhaden boats, do they ever catch other kinds of fish than menhaden?

A I am glad that you asked that. It is amazing how many millions of these fish congregate without a foreign fish being in them. Actual records will substantiate the fact. The foreign fish is probably one tenth of one per cent. Sometimes we catch millions of them and there is not a foreign fish in them. The biggest fish we catch is sharks. Usually, the way we catch those — well, they get entangled in the net. We don't want them. They clog the pumps and they just mess up the operation. Sports fishermen are constantly accusing us of doing this. They can't ever prove it. [94] Our books are open, our plants are open, our boats are open for their inspection. Any time they want to come down we have records of the catches that show that it is such a small percentage that they don't even catch enough edible fish to feed the crew on the boat. They

have to go out and buy fish and shrimp and stuff to feed the men on the boats.

Q The design of these boats and the equipment on the boats, are they suitable for catching anything other than menhaden?

A Not particularly, not in these waters. They can catch any school fish, any fish that can be seen from the top of the water. It is not like a trawling operation. The fish have to be seen.

Q Have you ever had instances in which the boats were fished for anything other than menhaden, where there was a knowing attempt to take a school of fish other than menhaden?

A No, sir. I am not saying that it hasn't been done, but I just don't have any knowledge of it. I think probably the area of the [95] greatest probability would be the mackerel fishing or something like that on the East Coast, or something like that.

Q Have you ever had a captain attempt to sell a catch without reporting it to you?

A No, sir.

Q That would be pretty hard to do in an industry this closely knit? There is no market other than the fish plants?

A Yes, sir.

Q Is this not an edible fish?

A It is not edible.

Q Do any of the companies we are talking about here charter their vessels for a season to a captain or someone else?

A To my knowledge, they have not. It has been done in other companies, but not this. It has been done in other fleets.

Q If you know, would you describe for me what a typical chartering arrangement is, what the terms are.

A I would like to go off the record, if I may.

MR. WATERS:

Well, let's go off the record.

(Discussion off the record.)

[96] BY MR. WATERS:

Q I would like, for purposes of illustration, one settlement sheet — not a settlement sheet, but one of these biweekly forms that is presented to the owner by the captain, and I would like one employee's earnings ledger sheet just to attach to the deposition. I would like one that has been filled in.

A What years are we talking about?

Q All quarters of 1956. Can you get one back there?

A We don't know whether we have them in this office here. Let me see if I can find some.

(Discussion off the record.)

BY MR. WATERS:

Q All right, sir.

A We found several. This is one for the SEA RAIDER. That is Charles Wallace, III, but I have an individual pay record on Louisiana Bunkers. It is the same kind of record as you have there. This is the individual record, which shows the — here is the man's name, Social Security number, [97] payroll period ending, number of fish, the rate, the tax and stuff that is withheld, and it also shows a difference in how the rate varies at times.

Q That is what we are looking for. Rather than

take your original records, would you have the girl make a copy of these?

A Yes, sir.

(Discussion off the record.)

BY MR. WATERS:

Q Mr. Styron, I hand you a two-page listing marked "Defendant's Exhibit No. 1," and I will ask you to tell me what that is.

A This is the record where the payroll information is compiled, and this is turned in by the captain to the office for preparation of the pay checks for the men.

Q I show you a two-page document marked "Defendant's Exhibit No. 2," and I will ask you to describe what that is.

A This is an individual payroll record of a particular crew member, which is prepared — which was prepared when the payroll check was prepared as a record for compiling his total wages, total earnings, [98] rather.

Q Are those two exhibits illustrative of the type of records that were maintained with respect to payments made to captains and crew members of the menhaden boats operated by these plaintiffs?

A Yes, sir.

MR. WATERS:

I have no further questions.

MR. LYMAN:

Just a couple of things.

DIRECT EXAMINATION

BY MR. LYMAN:

Q I believe Counsel asked you something about the direction that a captain decides to go when he wants to fish, and then you entered into a discussion that usually he goes where the fish are, particularly where they are seen on the surface, and then I believe you said sometimes two boats may approach the same school of fish viewed on the surface. Do you recall that?

A Yes, sir.

Q And I believe you said that sometimes between [99] the captains tempers would flare, and then they would decide how they would go about fishing it. Is that correct?

A Right.

Q Now, was that left to both captains themselves to determine who would fish, or would they first have to call the boat owners or call back here and ask for instructions?

A It was strictly between the captains themselves. The captains use their discretion as to what their rights are.

Q Some of the boats in question here are owned by absentee owners, so to speak. Is that correct?

A Yes, sir.

Q And they have no interest in the various fish meal plants that you described. Is that true?

A Yes, sir.

Q So between the captain of the vessel and that particular absentee owner, would they decide which

plant to take it to, with neither of them having an interest in the plant?

A That is correct.

[100] Q You discussed a question of a bonus which was being paid by the boat owner to a captain. Did the bonus apply to the captain only, and he in turn would distribute whatever he felt like distributing among the men, or was the bonus to the captain and the men determined by the owner?

A That is a little awkward to answer. During this period of time, we are covering a pretty good period.

Q Tell us again who originated the idea of a bonus. Would that come from the captain who demanded it, or would it come from the owner who would offer it to the captain as an inducement?

A It started originally as a feature whereby the captain could continue keeping his crew, keep them from moving from boat to boat.

Q Let me ask you this: The bonus money, is that money over and above the normal amount paid per thousand fish?

A Yes, sir.

Q So that had to come from the owner's pocket, so to speak?

A Correct.

[101] Q And he would offer that in varying amounts, or was that in a fixed amount?

A It was offered to the captain — to different captains in varying amounts.

Q Would the boat owner ever offer a bonus directly to the men, jumping over the captain, or was it always done through the captain?

A The captain designated the amount of fish that

particular person participated in. If the bonus was so much per thousand, that man was paid that amount.

Q Now, would this bonus or the amount of the bonus, so to speak, be negotiated with the owner? Was it a matter of give and take in conversation, or was it a fixed amount that was posted on a bulletin board somewhere?

A You are talking about an ever-changing thing. At one time the captain was allowed to take the total amount of money and divide it among the remaining crew members. If there were only 20 left at the end of the season, the 20 got the total amount of money. If there were 26, the 26 got it. At one time the captain was allowed — the [102] captain was allowed at one time to designate more bonus to one man than to another man at his discretion. In general, it didn't work that way. Most of the men received an equal amount of bonus based on the amount of fish that they had shared in catching, providing they were on the boat at the end of the season. If they left before the end of the season, that money was dispersed by the captain any way he saw fit. That has changed in recent years, but basically it works the same way.

Q Let's talk about groceries. I believe you stated that you may suggest to the captains that they get groceries in a local area, but was there any requirement that they do that?

A What do you mean by "requirement"?

Q That they had to do it or else they had to get off the boat.

A I have never heard of it being an issue like that. I think if the captain desired to purchase his food at a certain place, or the crew did, that it was done. I

mean, [103] there was never a time when the owner said, "No, you are not going to do that."

Q Would they usually purchase in a place where the owner or Wallace Menhaden Company had credit, or did that make any difference?

A It made no difference.

Q I believe you were discussing the question of a green man gaining experience on the vessel. Do you recall that?

A Yes, sir.

Q Now, you used the word "train" a man. Is there any formal training like school training, or does a man gain experience in time?

A I have never heard of any formal training in the form of schooling. It is strictly by experience. You acquire this experience while doing the work.

Q It was through experience rather than formal training that he developed his later acquired skills?

A Yes, sir. Now, a man like an engineer, he may have gone to Diesel training school or trade school or something of that nature, but I know of no formal training or schooling for fishermen themselves.

[104] Q In other words, any skill that developed, they developed this skill through experience rather than formal training?

A Right.

Q I believe you used the term "re-employment" when a new season would start. Was the arrangement between the owner and the captain any different when a new season started than when the captain first made his first arrangement with the owner?

A Every year, every season, was treated under a different — as a different arrangement. It may be

the same as before, but there was no continuity between what was done last year between these particular captains and the owners and what would be done next year between the captains and the owners.

Q That brings up the next question. Counsel was discussing with you whether a captain who had fished for several seasons may be favored when a new boat came into the picture. Did seniority have anything to do with whether a man got a particular boat, or was it the man's ability and qualifications that made the owners decide?

[105] A In varying degrees, seniority naturally had a part in it, if for no other reason than — when you continue to rehire a man, you are demonstrating your faith in his ability to perform for you, or you would have stopped rehiring him. The fact that he had been working with you for several years and had been producing cannot be overlooked as being a factor in the rehiring procedure.

Q Aside from your description there, would the fact that he may be just a minimum producer but had long tenure, would that give him a boat over a man who had less tenure but greater ability?

A If I were charged with the responsibility of operating a business, all of these factors would have to be considered. You have to build a certain amount of loyalty a certain amount of fairness, in your dealings with people. If I am dealing with this man or dealing with a group of men, my reputation is — I just don't throw a man away just because he goofs the first time or he doesn't — there may be [106] circumstances that cause him to produce less that are beyond his control. As such, I may have continued or recommended that

he be continued on. Fair play. I mean, we are not — I say "we". The owners of the vessels are not exactly cold-blooded machines. They do take into consideration the fact that a man has been with you and stayed with you and has worked with you for years and years and years, but it still boils down to the fact that you have to make money, you have to make profit, you have to produce. I cannot constantly produce if I have to hold on to men just because of the fact that they have been with the company for a long time.

Q Would the fact that a man has shipped out with you for five or six straight seasons and has made little money from the boat, would that carry greater weight than a man who shipped out two seasons and came down with tons of catches? Which would weigh heavier with you if you were issuing the new boat?

[107] A I would be forced to give it to the man that I felt would produce more.

Q Regardless of seniority?

A Regardless.

Q You feel that you would have to give it to the man that had the greater production and was more capable, or do you feel you would have to give it to the man who had been there longer?

A To the man more capable. I have to produce.

Q Now, I believe you answered it. You spoke of restricted areas, those areas restricted by law and not by the owners of the vessels. Is that right?

A Yes, sir.

Q Let's talk about the fines that were paid. I believe you said that really is the men's responsibility. Is that correct?

A Right.

Q But sometimes you say that you do have to put out a couple of hundred dollars to get the boat out, but it is charged to their account?

A Yes, sir.

Q If they remain with the vessel, is it expected [108] they would pay it off?

A Yes, sir.

Q If they leave, it is a debt owed by them if they ever return?

A We are emphasizing something here that in my many years with this menhaden industry, it has only happened once. It is of really no —

Q Custom would be then that it would be the men's responsibility, as far as you know?

A It would be, and it is understood that it is his responsibility. For good business practices, you just cannot let the captain feel that he can just run over everyone and expose the company to fines. I am sure that if we had not paid the fine, that the vessel itself would have been tied up. You just don't let that much investment be tied up, regardless of whose fault it is. You have to step in. If he doesn't step in and pay it, you have to step in and pay it for him. You have to get it out. Actually, this is the only instance that I have ever heard of.

Q Was there any actual direction or control by [109] you or anyone connected with the boats by telling the men over the captain's head how they shall conduct their fishing operations?

A None whatsoever.

Q If the same interests that owned the plant had an interest in the boat, it was expected then that the

captain would bring the boat back to that plant to unload the fish. Is that correct?

A Yes, sir, but that doesn't necessarily hold true because — the North Carolina corporation, who has a plant and they own a boat, it operates in Louisiana. You wouldn't expect the boat to carry back to North Carolina.

Q If it is in the area, it would be expected to come back?

A Yes, sir.

Q Now, was there anything that the boat owner could call upon this captain to do other than to fish the boat? Could he tell him to collect funds for the United Givers Fund?

A No, sir.

[110] Q Was there anything else that he was expected to do other than fish the boat?

A No, sir. Naturally he is to see that the boat is seaworthy and see that it is properly manned. He has to see that the cook doesn't build a fire on top of the table instead of in the stove. It is his responsibility.

Q Do you keep a ship's log for any reason?

A I don't think it is required by law, and we do not require it.

MR. LYMAN:

I have no further questions.

MR. WATERS:

Just a few more.

FURTHER CROSS-EXAMINATION

BY MR. WATERS:

Q I want to nail one point down here. I get the impression from the last questions on the point of bonuses that these bonuses, however they were calculated, were accumulated and paid on an annual basis at the end of the season. Is that right?

A Yes, sir.

Q Otherwise, you might have a basic arrangement [111] with the captain that he was going to fish that boat for $3.00 a thousandweight?

A Right.

Q They would basically get paid biweekly on the basis of $3.00 per unit?

A Yes, sir.

Q And the bonus would be accumulated and paid to the captain to be distributed as he saw fit at the end of the season?

A We are running across the period of time in which policies and customs changed. I don't want to confuse the issue because I think basically you both understand what was actually done, but in reality there was an area of time in here when it was done differently than it was done at other times. For instance, sometimes the bonus, was used to pay food bills that the men had not paid, and sometimes the captain had the discretion of taking the bonuses that were left from the men who were not there.

Q As his?

A As his, or to distribute among the crew or pay on grub bills, etc.

[112] Q Was there also a time when the company

required that the bonus be distributed in the same fashion that the basic sharing arrangement existed, as to the $3.00?

A No, sir, not in the same proportion. In other words, a 12 cent man would get a two-cent bonus. A 25 cent man would get a two-cent bonus, except there were times when that was changed and the captain would elect or pay the mate three cents bonus and the engineer four cents bonus, as long as the over-all amount didn't exceed what the owner had allocated to the catching of the fish.

Q In all of this shifting around that occurred over this period of time, to what extent was the boat owner involved in determining how the bonus was going to be allocated among the crew?

A During this period of time, there were changes from year to year. The best way to explain it is that the captain normally understood at the beginning of the season that he was going to be paid so much money per unit of fish and so much [113] bonus. There have been times during this period that due to circumstances, it was necessary for the owner to say, "We are going to pay you more money to continue these people on fishing." For instance, one of our problems today is that a competitor will come in and promise his crew a bonus, let's say, an extra $100.00 per man, and take the man off of my boat and put him on his boat because his return is going to be greater in two weeks than mine is going to be. We have to meet competition. Today, we are in more of a turmoil than we were back then. Some captains might say they can fish with 16 men, and they will take the 17th man's pay and dis-

tribute it among the better men. He has the right to do it.

Q Through all of these shifting, arrangements with respect to the bonus, did the company ever in any degree participate with the captain in the decision as to how that bonus would be split between the captain and the crew?

A In other words, if the issue came up before [114] the termination of the season and the crew members approached the captain regarding their bonus and asked if they could get a portion of their bonus now, the captain could not give them that portion of the bonus without first consulting the owner, and that is because the bonus was designed to keep the men on the boat. The judgment as to whether the captain could give the bonus, part of it now, to the men with the chance of losing the men, then the owner would have some share in saying no, you cannot do that.

Q Insofar as —

A Another thing, too. The captain has the authority — one day before the season is over with, he can fire a man and never pay him a dime's bonus, and that the only cause he would have to have is that the man didn't fulfill his duties or the man was not cooperative. He has the right to do that, and they did that quite frequently. Now, we would not allow a captain to come up a week before the season is over with and make a wholesale discharge of all of the [115] men, thinking that he is going to get the bonus.

Q This arrangement was such that the company would interfere at least to this extent with the cap-

tain's method of distributing and determining rights to the bonus money?

A Right.

Q Are any of these boats equipped with ship-to-shore telephones?

A Yes, sir.

Q Is there any communication between boats while they are not —

A Boats to boats, yes.

Q Is it common for captains to communicate with each other for the purpose of locating fish?

A Oh, yes.

Q Are there any instructions to them in that regard by the boat owners?

A None whatsoever.

Q This is whatever they want to do?

A Right.

MR. WATERS:

No further questions.

MR. LYMAN:

[116] I have a few more.

REDIRECT EXAMINATION

BY MR. LYMAN:

Q If the fishing isn't too good, then there is no bonus?

A That has nothing to do with it. It doesn't have any bearing at all.

Q Suppose there is no bonus offered by the owners.

There wouldn't be any bonus, would there?

A That is right.

Q You can't build up a bonus on the expectation that fishing might get better without the owner saying, "I am going to give you a bonus"?

A I hate to use this method of describing what actually happens, but —

Q Before you do that, is this bonus in any way a part of the original agreement between the owners and the captains, about how much is going to be paid?

A Yes, sir. It is designed for the purpose of keeping the men on the vessels until the end of the season.

Q This is a help that the owner gives the captain [117] to keep the men on. Is that right?

A Right. This originated from the captain, this theory did. He said that instead of paying 10 cents at thousand to these men, let's only pay them eight cents a thousand.

Q And let's hold two in reserve?

A Yes, sir. If they don't stay, they don't get it.

Q The over-all is going to be 10 cents a thousand, eight cents they pay and two cents is the bonus?

A Right.

Q If they are not there at the end of the year, they just make their eight cents, and the two cents goes into a pool?

A That doesn't hold true across the board. It holds true most of the time. In other words, every one of these things is an owner-captain arrangement. For instance, if a captain is a newcomer and has a new relationship with an owner, he sometimes isn't given the same consideration as some old-timer is. There

is no fixed amount that applies to every menhaden owner and every menhaden boat.

[118] Q Let me get back to the bonus again. The captain and the owner discuss how they can best accomplish their objectvie. The captain might say that he wants to hold on to this crew until the end of the season, when the fishing is at its height. He might say, "I have to either withhold a part of their pay, or let's call it a bonus, something extra they will get," and then the owner says, "All right. I will go along with that." Is that correct?

A We don't use the word "withhold."

Q Is that bonus a part of the original pay?

A Yes, sir.

Q So we don't really have a bonus, do we? What we have is a deferred payment. Is that right?

A I am not going to answer that in that manner.

Q Suppose a man is ultimately paid 10 cents a thousand, and he will be paid eight cents currently and when the season ends he will get his eight cents on his last pay and then there will be accumulated two cents per thousand over whatever [119] period of time he was working, and that will be paid at the last pay also. Is that correct?

A Yes, sir.

Q Sort of a balloon at the end?

A Well, I keep going back. The reason — I have to tell you the truth, and I have to tell you the truth as to how it was at that time and how it may be today. I want to make that clear in this record, that I am trying to report to you how the circumstances were in the period we are talking about. Custom, tradition, cir-

cumstances, economics have changed these things back and forth.

Q I just want to get the mechanics of it. Regardless of whether he gets 10 cents a thousand or $1.00 a thousand, whatever the original agreement was, the crew did not get the full amount during the pay periods during the season ?

A That is right. He did not get — he got it at the end of the season.

Q They picked up at the end of the season the difference between what he was paid and [120] what he was promised?

A That is an inducement for him to stay the entire season. He has a better opportunity of keeping a crew until the end of the season if he has money to pay them at the end of the season in addition to what their rate is. This is an accumulative thing because the man that comes on the last month of the season, naturally it would be unfair to the others to pay him as much as he would pay the one that has already been there. There is no difference between status, job classification, or anything else, wherein the normal pay there is. A man, because of certain qualifications, is paid a certain amount. Now, back in this period of time that we are talking about, there was a more lax way of doing it. The captain would elect to take a penny of his own money and give it to a man and give him three cents. We may object to it because it caused internal problems. Somebody else might say, "Why does he get three cents and we get two cents?" If the captain [121] took it out of his own bonus and did it, we have no way of knowing it. This has been going on for 50 years. This has been going on since the time — let's say

the men had caught one million fish, and the pay was $3.00 a thousand. We gave the captain a check for $3,000.00, and the captain took the check and got it cashed and put the money in a big dishpan and called the members up to his quarters at the end of the pay day and said, "Well, how many fish did you catch with me this year"? The man might say, "Well, I helped catch them all." He said, "Your rate is four cents, and I will give you $40.00." The relationship has continued. The only thing is that it has been reduced back in 1936, when this Social Security thing was started. I think in 1942 or something they said it was applicable to the fishing operation, and then that was the first time they ever started keeping any records of what anyone made. It was a deal of you catch the fish and bring them to the dock [122] and I will give you so much a thousand for it. The same thing is continuing on, except it has been reduced to records and it has been reduced to reporting withholding of taxes.

Q But the method of payment is still substantially the same?

A Substantially the same. I would say 99 per cent of the owners of these menhaden vessels in question do not know the name of one man or two men that is on the particular boats other than the captain or maybe the engineer. If he knows them, it is because he has been around and has seen them.

MR. LYMAN:

I have no further questions.

MR. WATERS:

Just one more.

FURTHER CROSS-EXAMINATION

BY MR. WATERS:

Q If a crew man quits before the end of the season, he doesn't participate in the bonus?

A No, sir.

[123] Q Not at all?

A No, sir.

MR. WATERS:

I have no further questions.

MR. LYMAN:

I have no further questions.

. . . . Thereupon, at 3:40 o'clock p.m., the taking of the witness's testimony was concluded. . . .

I have read the above and foregoing testimony given by me and the same is true and correct.

(Signed) JACK T. STYRON
JACK T. STYRON

[1] IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA

Filed: Aug. 31, 1966

SANTOS MENHADEN CORPORATION,
CITATION, INCORPORATED,
NOVELTY, INCORPORATED,
Plaintiffs

versus Civil Action No. 15172
Division "D"

THE UNITED STATES OF AMERICA,
Defendant

TESTIMONY OF WILSON BRIGHTMAN KORNEGAY, taken by the Defendant, by agreement, at 1221 N. Broad Street, New Orleans, Louisiana, beginning at 11:00 o'clock a.m., Thursday, August 25, 1966.

[1a] IN THE
UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

PATTERSON MENHADEN, INC.,
1221 North Broad Street
New Orleans, Louisiana

AGGIE & MILLIE, INC.,
1221 North Broad Street
New Orleans, Louisiana

Plaintiffs

versus Civil Action No. 15215
Division "C"

UNITED STATES OF AMERICA,

Defendant

TESTIMONY OF WILSON BRIGHTMAN KORNEGAY, taken by the Defendant, by agreement, at 1221 N. Broad Street, New Orleans, Louisiana, on Thursday, August 25, 1966.

[2] APPEARANCES:

For the Plaintiffs:
JOSEPH J. LYMAN, Esq.
Attorney at Law
1200 18th Street, N.W.
Washington, D. C.

For the Defendant:
ROBERT L. WATERS, Esq.
Attorney, Tax Division
Department of Justice
418 United States Courthouse
Fort Worth, Texas

PAUL W. WILLIAMS,
Reporter

WILSON BRIGHTMAN KORNEGAY,
having been first duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. WATERS:

Q Mr. Kornegay, in 1956 what was your relationship with Santos Menhaden Corporation?

A I was Treasurer.

Q Were you also the onshore boat manager for that company, so to speak?

A So to speak, yes.

Q Was the Santos Menhaden Corporation operation [3] exclusively a Menhaden fishing operation?

A Yes, sir.

Q What was your relationship in 1956 with Citation, Incorporated?

A Same relationship.

Q And that would extend to being the onshore boat manager, so to speak?

A Yes, sir.

Q Would the same hold true with respect to Novelty, Incorporated?

A Yes, sir.

Q Were the boats owned by Citation, Inc., and Novelty, Inc., Menhaden boats?

A Yes, sir.

Q Those were exclusively Menhaden operations too?

A Yes, sir.

Q What was your relationship in 1956 with Patterson Menhaden, Inc.?

A Same relationship.

Q Would the same hold true with Aggie & Millie, Inc.?

A Well, no. I was the President of Aggie & Millie, Inc.

Q Was Aggie & Millie, Inc., exclusively a Menhaden operation too?

[4] A Yes, sir.

Q Did these five companies, all corporations that I have asked you about, did any of them own a processing plant for the processing of Menhaden?

A No, sir.

Q Did all of them operate out of the same processing plant, so far as docking facilities were concerned?

A In 1956, they either operated out of Empire, Louisiana, or Cameron, Louisiana.

Q That would have been Louisiana Menhaden Company in Cameron?

A And Empire Menhaden Company in Empire.

Q Did any of these boats fish the Atlantic Seaboard grounds during 1956?

A Mr. Waters, you have me there. I think the DIANE & CARROLL may have gone to North Carolina two different times. I don't remember exactly when, but that was the only vessel that we ever had that went to North Carolina. When it went to North Carolina, it was the Wallace Menhaden Company where the captain unloaded.

Q Is that the only instance in which any of these [5] boats ever fished the Eastern Seaboard?

A That is correct.

Q In other words, they fished exclusively the Gulf Coast?

A Correct.

Q What is the location of the Gulf Coast ground, generally, for fishing Menhaden?

A Generally, I would say from Galveston to Mobile, but I question if our boats ever went that far East.

Q Have they traditionally just fished the Louisiana and Texas Gulf Coast?

A Yes, sir, because the plants now — now it is different because of the refrigeration. Before refrigeration there was no sense in going to Mobile and coming back with a boatload of rotten fish.

Q You mean they had to operate closely enough to the processing plant where they could get back in a day's time?

A The captain would know about his catch, whether they were in good shape, things like that. That is something he would determine himself.

Q Who made the determination between the vessel [6] owner and the captain out of which docking facility the boat would operate?

A Well, that would be an arrangement that the company would have.

Q This is an arrangement that would be made by the boat owner?

A Yes, sir, where the boat fishes.

Q Otherwise, if the decision is made that the boat will fish the North Carolina coast, this would be the owner's decision?

A Well, it would be the owner's decision, but there

would be a discussion between the owner and the captain whether the venture would be profitable in going up there.

Q What size crews do these —

A I might mention when the DIANE & CARROLL went to North Carolina, the captain more so than anyone, he had an interest in the vessel. He handled that himself.

Q But that was an instance where the captain himself was part owner in the vessel.

A That is right.

Q Is that typical or unusual for a captain to be part owner of a vessel?

A It is unusual.

[7] Q About what is the extent of the investment in a Menhaden boat?

A From about $125,000.00 — you are talking about our boats?

Q Yes.

A From about $125,000.00 to $300,000.00.

Q Is that current day's prices?

A That is correct.

Q What would it have been in 1956?

A From maybe $80,000.00 to about $175,000.00.

Q What would cause the variation between the $80,000.00 and $175,000.00? Would it be size?

A The size of the vessel, yes, and whether it was made of wood or steel construction.

Q What sized crews does a Menhaden boat carry?

A Today or then?

Q Then.

A Then?

Q Yes.

A Anywhere from 20 to 24 men, I think.

Q What size do they carry now?

A I think it is 17.

Q How was the crew selected?

A How was the crew selected?

[8] Q Yes.

A The captain selects all of the crew.

Q When you make arrangements with the captain, is it understood that you are obtaining a captain and crew?

A No, sir. We make arrangement with the captain to fish a vessel, and he in turn knows that he can't fish it by himself, that he has to have a crew, so he goes and gets his crew.

Q What sort of arrangement do you make with the captain as far as duration is concerned? Is the arrangement for the season?

A For the season.

Q Have you had instances where you terminated a captain during the season?

A No, I don't think so.

Q Is there somewhat less turnover in your captains and crews on Menhaden boats that there is in shrimp trawlers?

A There is very little turnover during a season or no turnover during a season in captains, but as far as the crews, I can't answer that.

Q How was a settlement made with the captain and [9] crew? Before that, what is the compensation arrangement in the Menhaden operation in yours, as between the boat owner and the captain and crew?

A The captain is paid — I don't know whether it is $2.50 a thousand or $3.00 a thousand. The captain is

paid so much, and he in turn distributes it among his crew.

Q But he is paid a fixed amount per thousand weight?

A That is correct. I imagine some of his better men, he might give them a cent a thousand more. I really don't know. The payrolls that the captains make up are made up at Empire and at Cameron, and I don't see the payrolls.

Q How often do you settle with the captain of a Menhaden boat?

A Every two weeks.

Q How is the information gotten from the unloading plant where the weighing and the measuring is is done to the payroll department that ultimately makes up the checks?

A When the boat unloads, — I think this is correct. When the boat unloads, the captain [10] or the mate or one of his men stand there and watch the fish go through a hopper, so many thousand weight. I think it is automatic now, but they used to pull a chain for the dump. When he gets through, whoever is weighing gives him a slip, so many thousand fish. He in turn turns that in to the office. When he is ready to turn in the payroll, he tells whomever might be figuring the payroll for him that this man gets so much a thousand and this man gets so much a thousand. "Here is my grocery bill." They figure it up that way.

Q You say when he turns in his payroll. Is this a list of all the people that have shipped as crew members during that two-week period and how many fish they share in and what —

A Yes, sir.

Q This is turned in to the payroll department by the captain or the crew member designated by him?

A I think the captain does it.

Q Have these five companies that we are talking about had any sort of bonus arrangement [11] with their Menhaden captains and crews?

A The captains — well, as I understand it, there is a bonus arrangement. The captain gets so much as a bonus, and he in turn distributes it among the crew the way he decides. As I said, he may have some men he wants to give two cents to, some he may want to give three cents to.

Q Is that a seasonal bonus?

A That is right.

Q It is not paid at the end of each trip?

A No, sir.

Q It is based on production over the entire season?

A Correct.

Q Does the company — boat owner I mean, when I am referring to the company — have any say with the captain in how that bonus is spread around?

A No, sir.

Q Is this exclusively the captain's province to determine who is going to share in the bonus and in what amounts?

A Yes, sir.

Q Is the understanding between the owners and the [12] captains such that a catch would be unloaded at Louisiana Menhaden Company even though the boat was normally operating out of Empire?

A The captain unloads wherever he wants to. There

are so few processing plants that he just doesn't have any choice.

Q How many processing plants are there, to your knowledge, on the Texas-Louisiana Gulf Coast?

A I would say under 15, 15 or 16.

Q Are there any of these in which Mr. Wallace has an interest other than Empire in Louisiana?

A I don't know that.

Q Those are the only two that he has an interest in?

A If he does, I don't know about it. There are maybe some others. If he does, I don't know about it.

Q Typically, how long will a Menhaden trip last?

A A day.

Q Are they normally out and back in one day?

A That is right.

Q How long will they normally stay inshore?

A They go back the next day, weather permitting.

[13] Q Does the captain determine where the boat is going to fish?

A Yes, sir.

Q Does he determine when the boat is going to leave?

A Yes, sir.

Q Are these boats capable of fishing for things other than Menhaden?

A I don't think so, no.

Q They are not used for fishing for anything other than Menhaden?

A Nothing but Menhaden.

Q How is responsibility divided between the owners and the captains for supplies, meaning fuel, ice, groceries, and so forth?

A The crew and the captain pay for all of the gro-

ceries. The boat owner pays for fuel, oil, whatever repairs, nets, whatever is necessary in the rigging, but the captain and crew pays for all of their groceries.

Q There is no ice in the Menhaden operation?

A There is some. When I say "ice," it is part of their groceries. They may buy a block of [14] ice or two blocks of ice.

Q They don't take on ice in the same sense that a shrimp trawler does?

A No, sir.

Q Going back to the fashion in which the captain and the crew members are paid, by whose check is their pay made?

A By the company's check.

Q Now, we say the company. Are we talking about the fish plant or the boat owner?

A The boat owner.

Q Is this — well, how is the settlement made between the fish plant and the boat owner? Is there a check or payment made every week or two weeks or month, or what?

A Oh, no, at the end of the season that is done. If the boat owner needs money to be advanced against fish that has been delivered to the plant, if Mr. Styron is in a good mood, he gives me a substantial check. If not, well, we just have to suffer along until the end of the season.

Q Typically, there is only one settlement made, and that is at season's end?

A At the season's end. Of course, in that settle- [15] ment, you find quite a few advances. We get the settlement about the first of the year.

Q When does the season end?

A The Lord handles that.

Q When the fish quit running?

A That is true.

Q When normally is that?

A There is — as a usual thing, I would say sometime in October. This is a bad year. We hope it is December, but the usual thing is sometime in October. Some years they start earlier than others. This year, fortunately, we started in April. We should have started in June.

Q How are your captains selected?

A How are they selected?

Q What sort of selection process do you go through in picking a captain for a boat?

A Well, you try to find a man that has been a good producer, whether he is in your fleet or in another fleet. If the season ends, let's say, about the 15th of October, in the next ten days we will have 40 men come by and ask to fish a boat.

[16] Q For the next season?

A For the next season.

Q Do you kind of keep a list of these men during the off season for the purpose of making your selection?

A Mr. Carinhas keeps a mental list.

Q He knows generally who is available?

A That is right.

Q This Mr. Carinhas, is he the one who makes the selection?

A Most of the time. I make the selection every now and then myself.

Q Have you had any instances where a captain

switched from one of your boats to another one of the boats during the course of a season?

A I just don't remember offhand. I think not, though.

Q Do you make advances to captains or crew members?

A Make advances to captains or crew members? Only to captains. I mean, the only advances made are made to captains. The captain is responsible for the entire operation of the boat. Anyone can go to [17] the office who wishes to go, but they just don't get any money unless the captain comes in there and tells them to give him a check for so much money for so and so. It has to be with the captain's authority because he is the only one that pays the men off, actually.

Q Otherwise, you don't deal directly with the men, only with the captains?

A Only with the captains. You can understand that when you have 17 men on a boat. I would venture to say I wouldn't know 20 men on 60 boats. I know the captains very well, but the other men I don't.

MR. WATERS:

I have no further questions.

MR. LYMAN:

I have no questions.

. . . . Thereupon, at 11:25 o'clock a.m. the taking of the witness's testimony was concluded. . . .

CERTIFICATE

I, the undersigned reporter, DO HEREBY CERTIFY that the above and foregoing is a true and correct transcription of the stenographic (Stenotype) notes of the proceedings herein, taken down by me and transcribed under my supervision, at the time and place hereinbefore noted, in the above-entitled and -numbered cause(s).

(Signed) PAUL W. WILLIAMS
Reporter

DEPOSITION OF WILLIAM GLADSTON OGLESBY

United States District Court
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Incorporated, Et Al,
Plaintiff

versus Civil No. 15170
Division "D"

United States of America,
Defendant

and Consolidated Cases

The deposition is being taken pursuant to notice. Appearances: Mr. Robert L. Waters, Attorney Tax

vision, Department of Justice, 418 United States urthouse, Fort Worth, Texas, representing United ates of America; Mr. Joseph J. Lyman, of Washing-n, D. C., representing the plaintiff.

The witness, after having been duly sworn, testi-ed upon examination by Mr. Waters:

Q Would you state your full name for the record, ease?

A William Gladston Oglesby.

Q Mr. Oglesby, where do you live, sir?

A I live in Mansfield Park, 204 Mansfield Park, lorehead City.

Q Have you lived at Morehead City for some num-er of years?

A Well, I have been living in this county all of my ife, except what time I was working in Louisana.

Q You indicated, I believe, that you have not fished or several years now?

A I quit fishing in October of '63.

[21] Q For how many years prior to that were you a isherman?

A Quite a few. I started fishing in '26 for different ones.

Q From 1926 until 1963 you were engaged some-time each year as a fisherman?

A No, there was several years in there that I didn't fish, in the 30's. I started fishing, let's see, I fished in '34, '35 and then I didn't fish any more until '42; and from '42 until I retired, I fished every summer.

Q Was this always menhaden fishing?

A Yes, sir.

Q How many of these years did you fish a boat that was a part of the Wallace fleet?

A I took a boat from Mr. Wallace in '48 and fished until '63.

Q And fished continuously until '63?

A That's right.

Q Prior to '48, did you fish for some other fleet?

A I was on a boat that was fishing for Mr. Wallace, but he didn't own the boat. It belonged to Mr. Will Webb.

Q Was it still fished as part of the Wallace fleet of boats?

A Yes sir.

Q Taking you back now to the year 1956, Mr. Oglesby, did you fish some on the Atlantic Coast that season?

A Yes sir.

Q Did you fish in Louisiana that season, as well?

[3] A Yes sir.

Q Were there a number of years where you fished some both on the Atlantic Coast in the summer and Louisiana?

A Yes sir.

Q Would you fish the same boat?

A Yes sir.

Q In both places?

A Same boat in both places.

Q Mr. Oglesby, did you select your own crew?

A Yes sir.

Q Was this always the case?

A Always the case.

Q Did the company play any part in the selection of your crew?

A No sir.

Q Did you ever have occasion to discharge a crew member?

A Yes sir.

Q Did the company ever ask you to discharge a crew member?

A No sir.

Q When you were fishing off the Carolina Coast, ordinarily, how long would your trips take?

A Well, I don't know, a round trip takes about 12 hours, probably.

Q But you were out on a day to day basis?

A Yes sir, day to day basis.

[4] Q Sometimes would you stay over night?

A No sir. Well, not out in the open, not on the fishing grounds, we did not. We would always come into the harbor but we wouldn't come back up to this port. We have stayed in Ocracoke at night.

Q Otherwise, you might not come back to the plant?

A That's right.

Q But you would come into some harbor over night?

A Yes sir.

Q Was it understood that when you were fishing for the Wallace interest that your catch would always be brought back to the Wallace Fisheries Plant?

A Yes sir.

Q Were you generally free to determine on a day to day basis where you would fish along the Carolina Coast?

A Yes and no. First of all we were until they got the planes and when they got the planes, why, the pilots in the planes would tell us about where to be the next morning to get the best of the fishing.

Q Otherwise, the company would have a spotter plane?

A Oh yeah.

Q That would relay information to you on where the fish were running?

A Yes sir.

Q Would you describe for me, Mr. Oglesby, what sort of arrangement existed concerning compensation both for yourself and [5] the other crew members? How were you paid?

A We were paid on, I don't know whether you would call it a bonus, or percentage, or what. We got so much a thousand for the fish.

Q So many dollars and so many cents per thousand weight of fish caught?

A Yes sir.

Q Was this fixed before the season started?

A Yes sir.

Q And would that price hold for the entire season?

A Yes sir, always did for me anyway. I guess it did for the rest of them.

Q Did the company put out a pay sheet indicating how much the mates would be paid, how much the engineers, etc. would be paid?

A Yes sir.

Q How often were you paid?

A Every two weeks.

Q Did you, as the captain, have to make up a payroll?

A I kept a record of it. I didn't make the payroll out. No sir, that was made up in the office. I had to turn in my sheet to show what each man was supposed to get.

Q Would your sheet indicate how many fish this

particular crew man would participate in?

A That's right.

[6] Q Did you make up some sort of record keeping or tallying process every time you unloaded at the plant? Did you get some sort of slip?

A Got a little slip from what we call the dump man.

Q This would indicate how many thousand weight of fish?

A Yes sir, that's right.

Q Assuming that your whole crew fished continuously for a two week period, then, you would simply indicate the total number that each crew member participated in?

A That's correct.

Q Say you had a crew member that missed one trip?

A He didn't get paid for that trip.

Q What would happen to the difference? Would that go to the captain?

A No sir.

Q Did it go to anybody, or was that something that the company just didn't have to pay?

A That was something — at times, now, it was divided up and depended on how many men. If we just had the same amount of men that they asked us to carry, then that would be divided equally between the crew; that short-hand money, what we called it. If we were carrying, sometimes I carry two or three men more than what they were paying me for, the crew would pay for them out of their money, you see, in order to have them. Then if there was one or two short, why, the crew just didn't have to pay them. That was all.

[7] Q What sort of arrangement did the company make with you about the size of your crew?

A They would specify how many men we could carry in a season, and if we wanted to carry more than that, for a long time, it was all right. That was up to us but for the last two or three years that I fished, I think, they wanted us to carry 17 men, or 18, whatever it was. If we carried more than that, why, well they didn't want us to carry any more than that.

Q Did you have to rely on your knowledge of men in the community who were interested in fishing in putting together your crew?

A Yes sir, I was in charge of that whole thing. I spent a lot of time trying to select a crew. In the winter time, why, I would see a lot of people and I'd see a man I thought would be a good crew, and I'd take my mate with me and I tried to get the best I could.

Q How would you go about selecting a replacement during the season if one of your men had to quit? Did you have any sources available to you?

A No, we didn't. We just had to pick up somebody.

Q It was just a matter of your hunting down somebody that was satisfactory to you?

A Yes sir. I understand it's pretty hard to find them now.

Q Approximately how many different boats did you fish for the Wallace people from 1948 to 1963?

[8] A Three.

Q What boats were they?

A I fished the W. M. Webb, the Sea Hawk, then the Ranger. The Ranger was the last one I fished.

Q Did you ask them to put you on a different boat

or was the company the one that made the suggestion?

A Well, I was after the best boat all the time.

Q Was this the reason for changing boats?

A Yes sir, to get a better boat, yes; however I made a mistake on the last one.

Q You mean it wasn't as good a boat as you thought?

A It was a good boat. It was a better boat, better built boat, but it wasn't as good a boat to fish where I was fishing as the one that I was on. In fact I lost a whole lot on it because the boat was late getting ready. I think the other boats, a lot of the, had four or five million fish before I got started. That hurt me a whole lot.

Q With the fleet, was there some competition for the better boats?

A Well, I guess there would be but I think the way Mr. Wallace worked that was that the oldest man that he had in his fleet would get preference.

Q And this would be how many seasons he had fished?

A Had been with the company, yes.

Q What responsibilities did you have toward the boat when it was in port, Mr. Oglesby?

[9] A Well, while we were fishing, I had the same thing in port that I was on the fishing grounds. I was in charge of the boat from stem to stern but now when the boat was in repair in the winter time, I would just walk around and look at it and look things over to see if everything was going all right.

Q During the season, when you came in from a fish-

ing trip, did you have to clean the boat? Did your crew have to clean the boat?

A Yes.

Q Was that part of your arrangement with the company?

A Yes sir, part of the arrangement.

Q Did you have any other responsibilities towards the boat other than keeping it clean while it was ashore?

A No, I don't think so.

Q Were your trips out almost daily?

A If the weather was so we could get out except on Sundays. We didn't fish on Sundays.

Q What were your responsibilities in so far as provisioning was concerned, fuel, groceries, supplies, etc.?

A Well, I had a cook that looked after the groceries and the engineer looked after the fuel.

Q Did you have, as the captain of the vessel, complete freedom as to where you would buy your fuel and groceries, etc.?

A I did, but I understand they changed that after I quit down there.

[10] Q During the period of time that you were fishing?

A During the time I was fishing, yes. They didn't tell me where I had to buy my groceries or anything like that. I bought them where I thought I could get them the cheapest. Where I started with a store at the first of the season, I usually stick with that store the season through.

Q And your cook would buy the groceries and I take it they would be charged to the company and then would be charged against your share?

A No sir, would be charged against the boat.

Q How would the bill at the grocery store actually be paid?

A It would be taken out of the man's pay each pay day. Each man would pay an equal part.

Q And otherwise the company, in its bookkeeping, when they made the pay every two weeks they would deduct enough to take care of the boat's groceries?

A That's right.

Q Did the company tell you where to buy your fuel?

A Yes, I think they did. Yeah, they would tell us where to get the fuel.

Q What other supplies would you have aboard?

A Well, I'd have some extra things that you usually use in fishing, oar lock, ropes and stuff like that. I always carried that and the company bought that for us.

Q All of your fishing utensils were furnished by the company?

A That's right.

[11] Q Otherwise, when you started out the season, the boat was ready to fish?

A Ready to fish, yes.

Q All that you had to come with was your crew?

A Crew.

Q And you furnished your groceries?

A Crew, and we furnished the groceries.

Q Did the company decide when and whether a boat would be moved from, say, Carolina to Louisiana?

A Yes sir.

Q And then it was a matter if you wanted to take it, fine?

A Yes sir.

Q I believe that's all.

CROSS-EXAMINATION BY MR. LYMAN:

Q Mr. Waters said the company decided when a boat would be moved from Louisiana, say, to the Atlantic Coast. Didn't that depend on whether there were any more fish?

A Yes sir.

Q So really the fish decided it more or less?

A Yes, during the spring of the year we would set a date. We usually leave there right about this time of the year to go to Louisiana, about the first of April.

Q In addition to groceries did the men purchase their personal gear, such as slickers, boots, etc.?

[12] A Yes sir. In fact, I was responsible for it because I'd get the stuff for them and if they didn't pay I lost it. The company didn't have anything to do with furnishing their boots and stuff like that.

Q You mentioned something called short-hand money. That means that, if you had less than the number of crew that the company had prescribed, there was an additional amount of money in that thousand per thousand weight that would be divided equally among the crew?

A Yes.

Q Would the engineer or the captain share in that?

A Yes, it went right straight through, the whole crew.

Q Sometimes you said you would carry more men than had been prescribed?

A That's right.

Q The company didn't add any money to that?

A No, it was taken out of the crew's money. They would average it up and that was taken out of the crew's money.

Q That came all the way down from the captain on down?

A Right, from the captain on down, yes sir.

Q When the company prescribed a number of men, would you find it to be consistent with safety and an efficient operation?

A Yes sir.

Q If you had any less everybody would be working harder?

A Yes, sir.

Q If you had any more they would be in the way?

[13] A Well, sometimes it is nice to have more. Of course, now, that was before they got all this hydraulic rig, you see. We really needed plenty of men. I had as many as a 28 man crew.

Q How many had the company prescribed at the time?

A 25.

Q So it differed from year to year?

A Yes sir, but after they got this hydraulic rig you can actually fish with 14 men but it is slower. You can catch more fish with 17 than you can with 14. That's the reason I carried 28. I could catch more fish with 28 men than I could 25, I'd get my net back quicker.

Q That was your decision rather than the company's?

A Yes sir, that's right.

RE-DIRECT EXAMINATION BY MR. WATERS:

Q You indicated, though, with these larger crews this was back when you had to manually haul in?

A That's correct.

Q You had to empty that net with your baskets, before they started working with the hydraulic —

A Yes sir, not a basket but what we call a dip net. It had a great long handle on it, you know, and you had to haul your fish up along side the fish boat by hand. All of it was done by hand.

[14] Q And most of that today is done by hydraulic?

A Yes sir.

Q How do, presently, they get the fish out of the net?

A Pump them out.

Q I have no further questions.

(COUNSEL AGREED TO WAIVE SIGNATURE OF WITNESS)

NORTH CAROLINA
EDGECOMBE COUNTY

I, MILDRED DAVIS MAYNARD, being a Notary Public for the State of North Carolina, do hereby certify that I sat in the office of Wallace Fisheries Company, 704 Arendell Street, Morehead City, North Carolina, at 9:15 A. M. on the morning of April 3, 1967, in the above entitled cause and the questions and answers recorded above were recorded by me and reduced to typewriting.

I further certify that I am neither counsel nor solicitor to either of the parties and that I am in no way interested in the result of this action.

Witness my hand and official seal this 28th day of April, 1967.

(Signed) MILDRED DAVIS MAYNARD
Notary Public

(SEAL)

My Commission expires:
November 12, 1967

DEPOSITION OF HARRY THOMAS WILLIS

United States District Court
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Incorporated, Et Al,
Plaintiff

versus Civil No. 15170
Division "D"

United States of America,
Defendant

and Consolidated Cases

The deposition is being taken pursuant to notice.

Appearances: Mr. Robert L. Waters, Attorney Tax Division, Department of Justice, 418 United States Courthouse, Fort Worth, Texas, representing United

States of America; Mr. Joseph J. Lyman, of Washington, D. C., representing the plaintiff.

The witness, after having been duly sworn, testified upon examination by Mr. Waters:

Q Captain Willis, would you state your full name for the record, please sir?

A Hary Thomas Willis.

Q Where do you presently reside Captain Willis?

A At Mitchell Village, Morehead City, North Carolina.

Q Have you resided in or around Morehead City, North Carolina for some years?

A Yes sir, just about 55 years.

Q How long have you been a sea-going man?

A That would be hard to answer, but I have been working with this company since 1924, regularly, going to sea for them; [2] but I did go earlier than that when I was about 14 years old, so that makes it just a little longer.

Q Has all of your seafaring employment, so to speak, or undertaking; has that been in fishing?

A Yes sir, it has.

Q For how many years have you been engaged in menhaden fishing?

A Well, right directly, since 1924.

Q Have you had a more or less continuous relationship since 1924 with what I will refer to as Wallace interest in the Menhaden business?

A Yes sir, that's right.

Q Has that relationship with the Wallace interest involved mainly being captain of one of their Menhaden boats?

A Captain or engineer. I was engineer for 16 years on one of the affiliated boats, that is, with the company.

Q And since that time you have been captain of one of the boats?

A That's right.

Q First of all, is the nature of the menhaden business somewhat seasonal?

A Yeah, that's right.

Q Would you describe for me what the seasons are?

A Well, the general thing it's from around the first weeks of April and now it generally ends in October. Now, it [3] did just a few years ago, when they operated this plant here, the season would end probably sometime the first of January and sometimes the last of January.

Q But, presently the season is from April to October?

A April to October, that's right.

Q Are you talking about the season on the Atlantic Seaboard?

A That's the Gulf.

Q That's the Gulf season?

A Yeah, we don't have any season on the Atlantic for the past few years.

Q You mean you have not fished for Menhaden on the Atlantic Seaboard for the last few years?

A For the last, well, three years.

Q Was there a time prior to that when you did?

A Yes, we did.

Q Approximately what period of time would the Atlantic season be comprised of, back when you fished the Atlantic?

A Well, it would be November, December and sometimes the month of January, and one or two years part of February, maybe two weeks in February. The general thing, November, December, and January.

Q What determines the season, the run of menhaden?

A That's right, the fall run. We fish from Florida some years in the summer months and up here in the fall of the year.

Q Referring back specifically to the year 1956; would you have had a fall season here off the Atlantic Seaboard?

[4] A Yes, that's right.

Q And that would have been approximately the months of November, December and January?

A Well, I fished at Florida that particular year, the year '56. I fished from Florida in the summer months, part of the summer. I don't recall just now. I know we had two or three bad seasons there and they closed the plant down and we didn't do anything until the fall of the year.

Q Did you fish the same boat from year to year?

A No, I fished the W. A. McIntosh, that was the name of the boat, from '41 until '49. Then I went on a boat by the name of the Dilly from '49 until '55. Then I went on a boat named the Admiral from '55 until '64.

Q Then you were fishing the Admiral during the year 1956?

A That's right.

Q Recalling as well as you can, Captain Willis, would you tell me where you fished the Admiral, in so far as what grounds you fished the Admiral, in the year 1956?

A Well, you mean on all the coasts?

Q Yes sir, if you would describe as much for me as you could.

A I could say as far as the South Carolina line to probably Daytona Beach on the East Coast, that is Florida and Georgia; and I will say Wimble Shoals, North Carolina, that's on Oregon Inlet, to probably Cape Fear, in the fall of the year fishing.

[5] Q Did you also fish the Admiral some off the Gulf Coast during that year?

A Not in '56.

Q Not in '56?

A No.

Q Did you fish the Gulf Coast some in later years?

A I fished the Gulf Coast in the Admiral, I don't remember, the latter weeks in June of '57 until October, I believe. I can't recall right offhand but I believe we left the Gulf Coast to come back to the East Coast in '57 in October. I'm not positive.

Q During the years that you fished off of the Atlantic Coast, here, and specifically in 1956, was there a fish meal plant here in Morehead City, North Carolina that you brought the catch to?

A Yeah, that's right.

Q What was the name of this plant?

A Wallace Fisheries Company.

Q Was the Admiral owned by a company known as G. B. L., Incorporated?

A That's right.

Q And this was the situation in 1956, you fished a menhaden boat known as the Admiral which was owned by G. B. L., Incorporated?

[6] A That's right.

Q The fishing took place on the Atlantic Coast, during that season?

A That's right, all of '56.

Q Captain Willis, would you tell me how you went about putting the crew together to fish a menhaden boat?

A Well, like if you start out some years, I mean, I have some men that maybe might stay with me 10 years. When I start out in the spring I find out if that man wants to go with me, you know, that year and fish with me. If he says, "Yes," he goes. If I need any new men, I have to go around then. I go most of the time to Brunswick County, up there I'll say. Sometimes you have a man from Virginia that will get in contact with you and he will want to go with you. He will probably write you a letter and if you want him, why, you answer his letter back and tell him his job is good, we'll start fishing maybe at any given time, or probably the middle of April, it might be the first of April. We don't never know just when the season, you know, will open. That's when the plant will open.

Q When you come to a company, one of the Wallace companies, during these years, particularly the G. B. L., Incorporated, do you make your arrangement with the company to fish the boat the entire season? Is this your understanding?

A Until I get fired, I just know that I am going to fish with them the next year. In other words, I fished with them [7] last year and if they had wanted to fire me, why they would have probably fired me. I just assume that I am going to fish it this year.

Q Is your understanding, or was it your understanding with the company, that you were to furnish

a crew, otherwise you were to come with a crew?

A Oh yeah, that's right. I furnish my own crew. I had to get the men together to fish the boat, I mean that season.

Q Is that traditional in the menhaden fishing industry, that the captain brings his own crew?

A Yes sir.

Q Do you know, particularly, why that is so?

A Well now, I will refer to years back. The men were on a salary years ago and the companies north would furnish some men but we never have fished on a salary at all. It was just on a bonus. I know that those companies north would probably furnish some men up there but they never did do that down this way, I mean. They never did do that. They always left it up to the captain to hire his own crew and engineer, well, all of your crew. You have to do that.

Q Were there occasions, sir, when you would lose a crew member during the course of the season, while the fishing season was on?

A Yes, sometimes we do.

Q Was it then up to you to go out and find a replacement crew member?

[8] A That's right, I had to go get a replacement.

Q Did the company assist you in any fashion in finding these replacement men?

A No, they did not. They might reimburse me if I spent some money for some gas or something like that. They might do that, but not generally. I generally take that on myself altogether.

Q Do you start a new season with a size crew that is just the right size, or do you try to line up a couple of extras to start the season?

A No, we don't carry any extra men. There's not any money stipulated for that. You just get so much per thousand fish. Last year we carried 17 men and the company tells us this year we can carry 18 men, so we carry 18 men this year. If that is what you mean.

Q Yes, I was wondering if there was a possibility that say, if 18 was the ordinary size compliment for a vessel of this sort, maybe you started out maybe with 20 so that you would have some extras in the event you lost one during the season?

A No, if I carry 20 I got to pay them myself. I try to carry the right amount of men.

Q Would you describe for me how a crew of 18 is divided in so far as their duties aboard ship are concerned?

A This year we will have two engineers, this year. Now, last [9] year we didn't have but one, I mean one regular, that stayed on the boat all the time. This year we have two engineers. We have a cook. We have a pilot, captain and mate and the rest would be classed as crew men; that is on the pay scale.

Q Who sets the pay scale?

A Well, the company generally sets the pay scale, what to pay each man. In other words, in your crew members you have, I will say the crew members, excluding the engineer and the cook and pilot; in the crew members you have a little different duty that they have to do. I will put it that way. They get extra money for the little extra work that they have to do, or a little more important work, I will put it that way, the engine crew members.

Q Well, let's get into the whole question of how you are compensated. You mentioned before, I believe,

that you in this area never fished on a salary?

A No, we don't fish on a salary.

Q You fish for a share of the catch?

A A share of the catch, that's right.

Q What, is it agreed in advance of the season that so much of the catch goes to the boat and so much goes to the crew?

A Well, the manner of our measuring the fish, if we caught a thousand fish that's a measure. They will write us an agreement the first of the season that we pay say $2.58 per [10] fish this year or $2.57 per thousand fish.

Q Will that price hold for the entire season?

A That's right. We don't expect to get any less but they might pay us more. We hope sometimes they might pay us more, and they do at times, they pay us a little more if they can.

Q But you start out with a price fixed per thousand weight of fish?

A That's right.

Q Is that the gross price for the fish? Is that what is going to be paid to the captain and crew?

A That's what's going to be paid to the captain and the crew, so much per thousand.

Q Otherwise this price you mentioned is the price that will be paid to the captain and crew for each thousand fish?

A That's right.

Q This unit of measure?

A Yes sir. We'll just say that $2.58 or $2.57 for a figure. I don't recall the price. I do have my agreement this year as to how much they are going to pay for the fish this year.

Q But this is something that would be fixed between you and the company before the season began?

A Yes sir.

Q How would it be determined how the various members of the crew would share in your total compensation?

[11] A Well, we have a pay scale that comes out. They put on this pay scale how it should be divided.

Q The company has a pay scale?

A That's right. Say, there could be some men in that that get a fraction of a cent more than others, that has more important work to do.

Q Do I understand that basically all of the engineers get about the same thing, all of the first mates, or if you only carry one mate?

A It is practically a set price, yes sir, out of that amount that they pay for the fish. That's right .

Q Would you tell me, as the boat captain, what your responsibilities are in so far as pursuing this fishing venture?

A Well, I am the captain of the boat. Like I say, I hire the crew. If they say that the factory or the plant will open around the 15th, they let us know in time and we get our crew together. They send us transportation and various things. If they loan them any money they send that to the captain and he goes around to the crew and gives the crew their transportation. They get the bus or any way they want to go. We try to be there to start the season whenever they say. If the season opens the 10th or the 15th and we can, we get there, and if we are ready to go fishing then, we go. We get our crew and just go ahead fishing. When we get ready

to we just go on fishing. If we don't get there the first day, we go whenever we can get ready.

[12] Q Restricting your discussion for a moment to a season like 1956, when you fished the Atlantic Coast and brought the catch back to Morehead City to the Wallace Fisheries Plant, would you describe for me, kind of on a day to day basis, how this business of fishing would be pursued over a period of say a week to two weeks? How often did you make a trip?

A Well, now in the fall of the year, most of the time we, see, at that time we didn't have any refrigerated boats. If we were close around and we had just a few fish, we would come into the plant with them that night. If we were probably down around Cape Hatteras and the weather was cool and we had a few fish, we might layover that night and come in probably the next day. We hardly ever keep the fish over, you know, one night if it was cool; why we probably would come in the next day.

Q Otherwise, the maximum length of the trips was approximately two days?

A No. Well, some falls here that we didn't stay out, I don't believe, one night. I don't recall just '56, whether we did or not.

Q Ordinarily it would not be more than two days?

A No.

Q You might stay out over one night?

A That's right.

Q How did you decide on a day to day basis where the boat would be fished?

[13] A Where the boat would be fished?

Q Right, which direction you would go.

A Well, we have spotter planes that finds fish for

us and we have radios on the boat. We can be out here and the plane can tell us whether there's plenty of fish at Cape Hatteras, and we will take off and go to Cape Hatteras and fish. The only way I could answer that question, if we don't have any plane, we just use our own judgment. We go out mornings and if the weather is just right we might go around Cape Lookout. We know the fish in the fall of the year are coming from the north and going south. We try to, you know, go to meet the fish.

Q Otherwise, you rely on your own judgment as a fisherman of some experience?

A Yes.

Q As to where to fish the boat?

A That's right.

Q Plus, you have the additional aid, sometimes, of spotter planes?

A That's right.

Q Plus, if there is already a boat out enjoying a good catch -

A We hear it over the radio.

Q Is this information shared pretty freely among the captains?

A Yes, sir. Well, you take in late years you have different frequencies, companies have different frequencies, they can talk to their plant and talk to another boat on their [14] frequencies and we can't hear them. Of course, we have sets that maybe sometimes a little set that will bring their frequency in, sometimes you do and sometimes you don't. You might bring one in and another one you don't.

Q Are you expected, or were you expected to share information with the other Wallace boats?

A Oh yeah, that's right. We talked, you know, from one boat to another practically all the time.

Q When the fish are running, do they ordinarily run in, well let me refer to it as a school or what, in a sufficient group that several boats can fish in the same ground without interfering with one another?

A At times, yeah. Yes sir, I have seen, not in late years, but I will say probably 10 years ago. I have seen big schools of fish that 30 or 40 boats could fish in. In the last two or three years up here it was mostly bunches of fish. Sometimes you would find, you know, places of fish that probably 10 or 15 boats; but I am just speaking about later years.

Q Were there some years, Captain Willis, when you did have a fishing season here off the Carolina Coast and also had a Gulf season?

A No. Well, like I did say, I fished one year in Florida part of the season and went to the Gulf part of the same season. That was in 1957. That was the only time that I ever fished in the Atlantic and then in the Gulf. I fished, [15] like I say, in the Gulf and back in the Atlantic that fall.

Q Who determined where a boat would be fished? Would you move a boat back and forth between the Atlantic and the Gulf?

A Well, I can just speak for this one year. That was all that I did, move from the Atlantic to the Gulf. They closed the factory down in Florida. There wasn't any fish there. Mr. Wallace let me know through Mr. Taylor that if I wanted to go to the Gulf, he would like for me to go. So I sent word back to him that if I could get a good crew to go, I would take the boat over and

fish the rest of the season over there, which I did. I got a crew.

Q Were you still fishing the Admiral at that time?

A I was fishing the Admiral at that time, that's right.

Q And you had fished off the Florida Coast until there were no more fish?

A That's right.

Q And then you moved over to the Gulf Coast?

A That's right.

Q Did you have to get a new crew?

A Part of the crew, I did. I had to hire part of the crew because part of them didn't want to go over at that time of the year. I didn't inquire. I know one man, the engineer, wouldn't go. He just didn't want to go over to the Gulf so I had to get another engineer.

Q When you were fishing out of Morehead City during the [16] Atlantic season here, how often would you take trips? How many days a week did you fish?

A Some days we fished every day, every day we could, if the weather permitted. We fished six days, every day, unless we were to the plant with a load of fish, unloading. Some days we would miss, you know, days that we would be to the plant. We couldn't get unloaded to get back out. Just as soon as we would get our fish out we would go on back and fish. If the fish were far away, if it was 12:00 o'clock, any time of night, we would go on back fishing, to be on the fishing grounds the next morning.

Q What time would you leave?

A Well, generally speaking, I mean, like if we were going to Cape Hatteras fishing, we would try to get down there probably daylight fishing. When you

are a fisherman, you try to be where the fish are.

Q Were there any company rules made known to you with respect to how many days a week they expected you to fish?

A No sir, that was left up to us. Of course, they knew that we wanted to fish every day we could.

Q Was that the general feeling among the boat captains, that they would fish the boat as often as they could while the fish were running?

A Yes sir, except Sundays. We never did make it a practice to fish on Sunday.

Q What understanding did you have with the company with respect [17] to the disposition of the catch? Was it understood that they would be brought back to the Wallace Fisheries Plant?

A Yes sir.

Q Were there any other menhaden plants, fish meal plants, here on the Carolina Coast?

A Yes sir. There are two more besides the Wallace Plant.

Q But the understanding was that the boat you were fishing would bring the catch back to the Wallace Plant?

A That's right.

Q What sort of arrangements prevailed with respect to the supplies and provisions for your boat, fuel, etc.?

A Well, the company always furnished rope, nets, all such stuff like that, and the fuel. The men on the boat share in the grocery bill. We fish on a bonus and it has always been understood that we pay our own grocery bill.

Q Do you select your own groceries and pay for them?

A That's right. We take so much out of each man's pay for groceries, his proportionate share.

Q So far as the actual mechanics of paying for the groceries, would you charge them at some local store that furnished goods of this sort and then the company paid for them and this was taken out of your share?

A That's right.

Q How often were you paid?

A Generally it would go on a two weeks basis, pay every two weeks.

[18] Q What sort of information did you furnish the office, with respect to your men, for the purpose of determining their pay?

A Well, we just make out a payroll, each man's name, how many fish, that's all, and his rate of pay. We put that on the payroll and turn it into the office.

Q How often did you do this?

A We did that every two weeks. We fished two weeks and we turned in our payroll and we would get paid the following Saturday, Saturday of the following week, as soon as they made up the payroll.

Q When you first start a season, do you turn in a list of your crew men's names, or anything, to the office?

A I always get social security blanks and stuff like that, you know, W-2 forms all filled out and turn into the office, and address in case of accident and for them to make out the payroll.

Q Has this always been the custom since you have been fishing for the Wallace interest?

A Yes sir.

Q In so far as your compensation is concerned, did the company ever advance money to the captain or crew members?

A Yes, they do.

Q Who was responsible for money advanced to a crew member?

A The captain.

Q Was it always done through you?

[19] A Yes sir.

Q Otherwise, any one of your crew who wanted an advance, he had to get it through you?

A He had to sign, just sign a blank that he had borrowed so much money, and the captain had to sign. In other words, the captain was responsible for it.

Q Did you ever have an occasion where the company requested you to discharge a crew member?

A No sir.

Q Did you ever have occasions to discharge a crew member during the course of a season?

A Yes sir.

Q What typically would be a reason?

A Well, the general thing, if a man won't do his work, if he stays ashore drunk or something like that, I get somebody to replace him, if I can.

Q Does the company set a minimum or maximum crew for fishing the boat?

A Well, like I said, they tell you to carry so many men. That's the limit, I mean, on your men; like your 18 men this year. They allow us up to 18 men, allow us to carry up to 18 men.

Q Could you actually fish the boat with, say, 16 men?

A Yes, I can fish the boat with 16 men.

Q Would they permit you to fish the boat with 16 men?

[20] A Oh yeah, that would be left up entirely to me, rather than to stay at the top, I would go out there and work twice as hard to keep from losing a day's work.

Q Would you still get the set price per thousand weight of fish?

A That's right, that's divided equally among the men. If you are shorthanded one man, then that money is equally divided among everybody on the boat, all crew members.

Q During a season, say, when the company said, "We are going to fish 18 men crews this year," would they permit you consistently to fish a 16 men crew as a matter of your choice?

A Well, I wouldn't know how to answer that. They wouldn't want you to. They would want you to carry whatever amount they put down on the payroll. In other words, if they tell you to carry 18 men, why you want to carry 18. We just figure that if we have modern power blocks; now, we have fished and used as high as 26 men in a crew years ago. We have modern equipment now and we can fish with 16 and we could fish maybe with less than that; I mean, make out. We couldn't do good. They know that 18 men can do better than 14, or 15, or 16, so they allow us that many.

Q Well, experience has shown that that's the best size crew, 18 men?

A Yeah, that's right.

[21] Q Did you have in years gone by, and specifically during the year 1956, any sort of bonus arrange-

ment with the company, depending on the quantity of the catch for the whole season?

A If I can recall, they paid the crews a bonus in Florida that year and Louisiana, too; part of them went over to Louisiana.

Q Would you tell me how this bonus worked? Do you recall?

A Well, the crew members, if I recall, got 2¢ a thousand, that is, the measure of fish. When they closed the plant down in Ferndina to go to Louisiana, they paid off the bonus for fishing in the state of Florida. Then, when we went to Louisiana, they paid 2¢ a thousand bonus for what fish was caught in the Gulf.

Q You mean this was the amount of bonus, 2¢ per thousand?

A If I recall right, it was 2¢ that year.

Q Was that to each crew member?

A That's right.

Q Otherwise, would the captain get the same bonus as the lowest member in the crew?

A Oh no, the captain gets a different bonus, that's agreed at the beginning of the season.

Q Each different pay scale, so to speak, got a different size bonus?

A No, the captain got more bonus that particular year and [22] some following years. They got 2¢ a thousand, everybody except the captain. The captain got more bonus.

Q Did you ever have a man injured aboard one of your boats, Captain?

A Yes sir.

OBJECTION BY MR. LYMAN:

Objection, the question of injury and workman's compensation are immaterial to the issues in this case.

Q You indicated that you have had a crew man injured aboard one of your boats?

A Yes sir.

Q How was his injury taken care of? What were your responsibilities when a crew man was injured?

OBJECTION BY MR. LYMAN:

For the same reason.

(Mr. Lyman has objection to all questions along this line.)

Q What were your responsibilities when a crew man was injured?

A Well, if a crew man was injured, I gave him what first aid I could. If it was so that a plane, like we did use sea planes at one time for spotting fish, if the weather was so we could get the man on the plane, we would get him on the plane and take him to the nearest hospital, doctor, or medical aid, I'll say. If not, why, we would just get him to the nearest medical aid, just as quick as possible.

Q If a crew man were disabled for some period of time, a week, two weeks, a month, did he continue to get his share of the catch?

[23] A I don't remember just how long he did. I know we have paid crew members, or maybe for a short period of time out of a catch of fish. Then, I think the company—I don't know exactly but I assume the company would take care of —

OBJECTION BY MR. LYMAN:

Object to any assumption, unless you know.

A Well, I wouldn't know for sure.

Q Captain Willis, I believe you indicated that during the period of some, well I guess it is getting close to 40 years now that you have worked with the Wallace interest, you have changed boats several times?

A Yes sir.

Q What was the occasion of your going from one boat to another boat?

A Well, it was just a better boat to fish, larger boat, more modern boat.

Q Do you have more seniority than any of the other captains in view of the years of service?

OBJECTION BY MR. LYMAN:

I object to that. You are drawing a conclusion as to what a longevity of the relationship represents and if he gives an answer this would be stating merely a conclusion.

A I believe so. I'm not positive, but I believe so.

Q Does, according to your understanding from having fished for the Wallace interest over a number of years, would this [24] give you the first choice on any new boat brought into the fleet?

OBJECTION BY MR. LYMAN:

Object to any understanding which is more of a characterization that it would be stating a fact. There is no foundation laid for the understanding.

Q You indicated that you have worked for the Wallace interest since 1924?

A Yes sir, that's right.

Q Now, this has been continuously fishing menhaden vessels for the Wallace interest?

A As I say, engineer and captain together, yes.

Q During this period of time have there been some number of new boats owned by the Wallace interest which have been more or less brought into the fleet which you fished as a part of?

A I didn't understand that, exactly.

Q During this period of some 40 years, have they brought a number of new boats into the fleet?

A Yes sir.

Q Describe for me, if you know, what the practice has been with respect to who, meaning which captain, would have the opportunity to fish the newest vessels?

OBJECTION BY MR. LYMAN:

Object to your asking the practice which is countered to asking this witness to discuss company policy which is asking for a conclusion and therefore the [25] question is objected to.

Q If you know, from having witnessed which captains went on which boats, tell me?

A Well, suppose, I just answer for myself.

Q All right, sir.

A Well, the boat that I am on now is three years old and when they was building this boat that summer they contacted me. I was on the Admiral and they asked me if I would like to fish that boat to Empire the next season. All I had to do was say yes or no, and I said I would. That's the way I got the boat I'm on now.

Q Are you talking about fishing out of Empire, Louisiana?

A Yes, that's right.

Q Is that where all of the Wallace boats were fishing that year, out of Empire?

A No, they had some at Cameron.

Q But they didn't have any fishing then out of Morehead City?

A No, not at that particular time. They didn't fish any until that fall, the best I can recall.

Q What is the name of the boat you are fishing now?

A The Sea Hunter.

Q Is it a larger, more modern, boat than the Admiral?

A It's a more modern, new, steel hull boat and it's more modern, and it's a refrigerated boat.

Q It is a refrigerated boat?

A It's a refrigerated boat. It's about the same size, [26] approximately, that is, the length.

Q Can you stay out longer with a refrigerated boat?

A Yes sir, just keep your fish longer.

Q Approximately how many days would your trip extend to with a refrigerated boat?

A Well, you could stay out. If you didn't get but just a few fish you could probably stay out a week before you come in. You know, that depends on the catch.

Q You might get a good enough catch where you don't want to stay out but one day?

A Hopefully, that's right.

CROSS-EXAMINATION BY MR. LYMAN:

Q Captain Willis, this bonus that you talked about. That's not guaranteed every year, is it? That all depends on how much fish you catch?

A Well, it has been for, I can't recall just how many years they have been paying the crew 2¢ bonus, you know, if they stay to the end of the season.

Q Then the bonus depends upon if they remain?

A That's right.

Q You call that a bonus rather than additional pay?

A Yeah, that's right, we call that a bonus. Like if you hire your crew, you tell them they are going to get 2¢ a thousand bonus. It depends on the year. This year they are going to get more. It is all set on our pay scale, different men [27] get more bonus.

Q If he leaves before the end of the season for any reason he wouldn't get that bonus?

A He forfeits his bonus, that's right.

Q That's an inducement to stay on?

A That's right.

Q If you don't catch any fish, he wouldn't get any bonus, would he?

A He wouldn't get any bonus.

Q Mr. Waters asked you about the number of men that you carried from time to time and I believe you said the company, this year or a particular year, said you should carry 18, but I believe you said that you went out with less than 18. Is that a correct statement?

A Yes sir, sometimes we do. If a man just don't show up, we go fishing anyway. We won't stay tied

to the dock when we know that it will put a little more work on, you know, different ones in the crew. We'll need them, for instance, we'll fish short-handed rather than lose a day's fishing. In pretty weather, we'd go fishing short-handed. The crew would want to, up to a certain extent, you know, where we could fish all right.

Q But the decision was yours, whether you could go out shorthanded or not?

A Yes sir.

[28] Q Did you find the number of men that the company suggested that you take was consistent with safety and an efficient operation?

A Yes sir.

Q About that rate of pay, you said that the company fixed a rate of pay. Did I understand you to say that?

A Yes sir, we have a regular pay scale.

Q Could the captain at his discretion change that if he wanted to, depending upon a man, give him more or less?

A No, now, they do in that rate of pay. Although I wasn't asked that, I didn't voluntarily say, that in that rate of pay they probably might give you two or three cents extra money in that rate of pay, that you can give; like a good net man, a good man to help you rig up, you can give him part of that money. If you don't give it to them, why, it's just money that nobody gets. But you generally have some men in your crew, you give it to a good man in your crew, or something like that.

Q You said they would allow some extra money for

a good net man, would that money go to the captain if he didn't distribute it?

A No sir.

Q What would happen to it?

A Well, if it didn't go on your payroll, why, the company wouldn't have to pay that; but generally they give us 3¢ [29] a thousand, I'll say 3¢, now they don't this year. They don't stipulate any money for that this year.

Q That's not part of the rate per thousand then?

A No.

Q It is something extra that the company would throw in if the captain wanted to distribute it?

A Yes, that's right.

Q And if the captain didn't want to distribute it, then the company would take it back?

A Yes sir.

Q Speaking of the company now, the Wallace interest, that runs these various boats; do they recommend this pay scale for the men and it is consistent, do you know, throughout the fleet?

A Yes sir, that's right.

Q In other words, has it ever been discussed that a captain should not make it known that he is giving one man more on one boat than another captain is giving on another boat?

A In our fleet, I'll say our plant, all of the boats that operate throughout our plant, whether it is individual boats; they all try to pay on the same scale. Of course, that would cause a disturbance among the crew. If one man was fishing on one boat and getting more than others, why, that would cause a disturbance, naturally.

Q That would be the reason why this level of pay for crew members is maintained. Is that your understanding?

[30] A Yes, I should think that in our company.

Q Was that ever discussed with you or was that just something that grew up.

A No, it was never discussed.

Q Do the men purchase their own personal gear, like gloves, boots, etc.?

A Yes sir.

Q And how about their own laundry?

A They do their own laundry, go to the laundromat.

Q Have you ever taken a load of fish to any other plant than the Wallace Plant?

A Well, I fish for the Wallace interest one year and they sold fish to Delaware.

Q If you happened to be in an area too far from the Wallace Plant did you take it into another one and sell it?

A No, I never did. Some boats might have if they had some mechanical trouble or something like that, and some other company would take the fish out for them, but I never did.

Q Did they pay you the same price?

A Yes sir.

Q Actually, if the captain didn't want to go out fishing on a certain day, it was up to him whether the boat went out or not?

A Well, more or less. I will put it this way. The captain wants to go every day and if he can't go fishing, it's [31] entirely left up to the captain when to go, but it was an understanding that if I was fishing a boat for Mr. Wallace and I wouldn't go some days, I don't be-

lieve I'd be there very long.

Q In other words, if you decided you didn't want to take a boat out for some reason and he thought you should go, he wouldn't give the boat to someone else, would he?

A I think he should. I don't know what he would do.

Q If for some reason you didn't want to fish it, somebody else can take it? The boat is yours for the season?

A Yes. I guess he could if I didn't want to go. Yes, that's right.

Q But you say you worked for a whole season, that's your understanding with Wallace, and in that season you will fish as often as you can?

A Yes sir, every day that I can.

Q Has there ever been a situation that you know of where a captain decided that he wanted to take a week off or a month off and Wallace turned the boat over to someone else?

A No sir, I don't know.

Q Each season that you come back you have a new arrangement, do you not, with the company. You enter into a complete new arrangement?

A Well, would before the start of the next season, naturally, yes sir.

[32] Q About these radios, that you say you share the information; are you expected to share the information? Do you mean expected, that this is a custom among the captains?

A It is just a custom among the captains. You can keep it to yourself if you want to. Well, the fishing information, I'll put it that way; the fishing information you get from spotter planes or by boats. Of course,

he can hear the information as good as I can. If I find some fish somewhere and our boats are somewhere else, well, I could call those fellows, "Here's some fish down in the vicinity."

Q Does the weather ever prevent a plane from going out to the spot and yet the boats can go out and fish?

A Yes sir.

Q Well, then you rely upon your own judgment as to where to fish?

A Yes sir.

Q No one is guaranteed any money out of this thing?

A No sir.

Q That includes the engineers, cooks and everything else?

A No one.

Q You used the word "fired" a little while ago. You said that at the end of a season you would lay off a few months and then you come back and you would make another arrangement with Mr. Wallace. I believe that's the way it's done, [33] isn't it?

A Well, that's for the starting of your new season. Like if season ended October you would make other arrangements for the next year.

Q You said that Mr. Wallace could have fired you if he wanted to. Did you mean by that, he just didn't have to give you a boat, if he didn't want to?

A No, he wouldn't have to if he didn't want to.

Q I have no further questions.

(COUNSEL AGREED TO WAIVE SIGNATURE OF WITNESS)

NORTH CAROLINA
EDGEMORE COUNTY

I, MILDRED DAVIS MAYNARD, being a Notary Public for the State of North Carolina, do hereby certify that I sat in the office of Wallace Fisheries Company, 704 Arendell Street, Morehead City, North Carolina, at 9:15 A. M. on the morning of April 3, 1967, in the above entitled cause and the questions and answers recorded above were recorded by me and reduced to typewriting.

I further certify that I am neither counsel nor solicitor to either of the parties and that I am in no way interested in the result of this action.

Witness my hand and official seal this 28th day of April, 1967.

(Signed) MILDRED DAVIS MAYNARD
Notary Public
(SEAL)

My commission expires:
November 12, 1967

DEPOSITION OF JAMES S. FULLWOOD

United States District Court
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Et Al,

Plaintiff

versus Civil No. 15170
Division "D"

United States of America,

Defendant

And Consolidated Cases

The deposition is being taken pursuant to notice.

Appearances: Mr. Robert L. Waters, Attorney Tax Division, Department of Justice, 418 United States Courthouse, Fort Worth, Texas, representing United States of America; Mr. Joseph J. Lyman, of Washington, D. C., representing the plaintiff.

The witness, after having been duly sworn, testified upon examination by Mr. Waters:

Q Mr. Fullwood, would you state your full name for the record, please sir?

A James S. Fullwood.

Q Mr. Fullwood, where do you live?

A Supply, North Carolina, near Shallotte.

Q How far is that from Morehead City?

A Approximately about 150 miles.

Q How long have you been in the business of fishing for menhaden?

A I been fishing for them most of the time since about '36, [2] somewhere along there.

Q Did you start out as a crew member?

A Yes sir.

Q And probably somewhere along the line you were mate?

A Yes sir, from a crew member to dry boat and then mate.

Q How long have you been a captain?

A I was a captain '54, '55, '56, '57 and '58.

Q Do you still fish?

A Yes, I do.

Q What boat were you captain of in 1956?

A I was captain of W. M. Webb in '56.

Q When you were captain were you responsible for putting together your own crew?

A Yes, I was.

Q Did the company give you any assistance in this or was this something you had to do yourself?

A I had to do it myself. They gave me the boat so I done all the hiring.

Q Did you fish off the Carolina Coast and off the Louisiana Gulf Coast?

A That's right.

Q When you were fishing off the Carolina Coast, who decided where you would fish on a given day, whether you would fish off Cape Hatteras or some other ground?

A I did.

[3] Q What did you rely on in deciding on a day to day basis where you would fish?

A Well, most of the time in the fall of the year we would fish this area from here on back to Wrightsville Beach. It's a winter time fish and we know that the fish are coming from the north so therefore we go that way until the fish get by and when we think most all of the fish get by, and then most all of the boats will stop in here. We would steer off and we would go east and so that's the way we would work.

Q And this is just knowledge you have gained over the years as a fisherman here?

A That's right.

Q Did the company also use spotter planes to determine where the fish were running heavily?

A Yes, they did.

Q Did the captains in the fleet share information as to where they were catching fish?

A What do you mean?

Q Did you talk with each other over your radios as to if one boat captain was catching fish well in one place, would he inform the rest of the captains that were working for Mr. Wallace?

A Sometimes we would call them but hardly ever one would call you and tell you he was catching fish. He wanted them for [4] himself. When we know it is when we come in and just happen to know where he is or the plane called us and if it is far away we would still do our own deciding where we would leave or go way yonder. Most of the time if it was a slow boat we would stay right here and scrap them and let them catch them on up yonder.

Q Was it understood that when you caught your fish that they would all be brought back to the fish meal

plant that was operated by Wallace Fisheries?

A Yes sir.

Q Was the same thing true when you were fishing off of Louisiana? Where did you fish from there?

A I fished out of Empire and I fished out of Cameron.

Q Was there a fish meal plant at Empire and one at Cameron?

A That's right.

Q Was it understood that when you were fishing as part of the Wallace fleet that you would bring your catch back to either Empire Menhaden Company or whatever the name of the company was that the Wallace interest owned in Cameron?

A No, sir, when I was at Cameron I would fish out of Cameron and bring the fish there. If we got to go a long ways past Morgan City and the Weather got back, if we see fit to call the company, why I would call the company and tell them how the weather was and if we were near to Empire, I have put some off there.

[5] Q Otherwise, even though you were fishing out of Cameron you might put your fish out at Empire?

A If the weather was bad and I'd think I couldn't get back to Cameron on account of the condition of the weather, I would call Empire and then the superintendent would tell me that it would be all right to dump them there. I have done that.

Q Did the company put out a pay sheet at the beginning of each fishing season setting the scale of pay for the various crew members?

A Yes sir.

Q Were you informed before the season started

what the company was going to pay per thousand weight of fish?

A Yes sir.

Q Would this pay rate hold up for the whole season?

A Yes sir.

Q Did the company tell you what size crews you were expected to have?

A Yes sir. They would tell us how many men were members of the crew.

Q Was there any sort of bonus arrangement?

A Yes sir, 2¢ bonus the end of the season, if you stayed.

Q Otherwise, only the members of the crew who fished the whole season got the bonus?

A That's right.

[6] Q What would happen if you had a man who came in in the middle of the season to replace a crew member who left, would he share in the bonus?

A Yes sir.

Q Otherwise, if he finished up the season, he would share in the bonus?

A Yes sir. If we had taken in a member, whether it was two weeks prior to leaving the entire date, whatever fish he was in, why he got the bonus.

Q He had to fish at least two weeks?

A Oh no, if he had fished one day. If he went on the boat and didn't catch no fish, why, he didn't have no bonus; but if he went on the boat and caught some fish, whatever fish he caught he got his bonus right along with the man who was on at the beginning of the season.

Q It is just that he didn't catch as many fish?

A That's right.

Q Otherwise, he still got his 2¢ a thousand?

A That's right, he still got his bonus.

Q Mr. Fullwood, how did you go about selecting provisions for your boat, as far as fuel and groceries were concerned?

A The fuel, we fueled at the plant when we come in.

Q Where was that, at Empire or Morehead City?

A When I was here, we fueled here.

Q You mean at the fish plant, itself, had its own fuel supply?

[7] A Oh no, not here. I don't ever remember fueling down to Mr. Wallace's fishery down here at the plant. I may have at the beginning of my fishing days but after I become responsible I don't remember any fueling being done here. All the fueling that I remember, seems like to me, first was the city dock where we tie up right down here. For over many years they changed and went up here to the Texaco place right behind Mr. Parker's Ford place.

Q Did the company tell you where to buy your fuel?

A They would tell us the place they had selected for us to get fuel at.

Q Otherwise, it wasn't up to you to choose which place to go, you simply went where the company said to get the fuel?

A That's right.

Q Did you decide where you would buy your groceries?

A Yes sir.

Q That was your choice?

A Yes sir.

Q Wherever you bought your groceries, did they charge them to the boat?

A Yes sir.

Q And it was deducted from your share of the catch?

A That's right.

Q When pay day came?

A That's right. It was divided in so many parts among the crew and each one paid a part of the groceries.

[8] Q And you got paid every two weeks?

A That's right.

Q Did you have to turn in a payroll sheet every two weeks, as captain, specifying how many thousand weight of fish each member participated in in that two week period?

A I had a pay, I called it a work sheet each day that we'd catch fish. It was something like this little sheet here where it's lined off and the names all the way down. Each day I would fill one of them. If I go out and I didn't catch but 10 thousand fish, I would put down the man's name each and every day, his rate of pay, right on down to each man's name. At the end of the two weeks then I would take a sheet and send in the payroll. If you were on the boat and you were getting 15¢ a thousand and you had to stay out and I had to replace another man to put there that I thought was capable for your job, why then I would put another man to that man's job and give him your pay. So, therefore, at the end of the two weeks, why then I would figure up so many fish for you and you may have been short 300 thousand that day, and give it to that man, the rate of pay on every fish caught. Then I would

turn that pay scale into the office and they figure the time up according to that.

Q But, the sheet that you turned in every two weeks would show for each crew member how many fish he participated in and what rate?

[9] A That's right.

Q Otherwise, you might have had a man that had caught so many fish at 15¢ and so many fish at 13¢?

A That's right.

Q Simply because he had two different jobs during that two weeks period?

A That's right.

Q And then the payroll people in the office would figure up what his money was in dollars and cents?

A That's right.

Q Before the season started every year, did you have all of your crew members go by the office and fill out the tax forms, etc.?

A That's right. If they didn't go by the office, I would bring them over to the boat.

Q Otherwise, you would bring them to the boat and get them filled out and then you would take them back to the office?

A Yes sir, take them back before they got any money.

Q Before the first pay day?

A That's right.

Q Did you ever change boats when you were captain, Mr. Fullwood?

A Yes sir.

Q Did you ever get a better boat?

A I don't know about a better boat. I got a different boat.

Q How did this change come about? Did you ask for a different boat?

[10] A Yes, I did. In '54 I asked for one and they gave me the Charles S. Wallace, III and at the end of that season I asked for another one.

Q For a different boat?

A For a different boat. That was the George R. Wallace.

Q Well, now, who had been fishing the George R. Wallace? Was it a new boat?

A No, oh no, it wasn't no new boat. Captain Sylvester Willis, he had been fishing that one. I believe he, I'm not sure, but I believe he taken the Jack T. I'm not sure.

Q You mean Captain Sylvester Willis was moving to another boat?

A That's right.

Q And you asked for his old boat?

A That's right, his old boat. I brought that one here. The Charles S. Wallace, III, I only fished it that one summer.

Q And then you brought the George R. Wallace here to Morehead City?

A Yes sir.

Q Did you ask for the George R. Wallace, thinking it was a better boat?

A Yes sir.

Q Did you think you could catch better fish with it?

A That's right.

Q Did you fish it the next season?

[11] A Yes sir, I brought it here that fall, the fall of '54, and fished here the season and tied up and carried it to Ferndina Beach, Florida in the spring

and fished there that summer. Then we tied up and I told Mr. Wallace, if he expected me to be his captain for another year, I would appreciate it if he didn't send me to Ferndina as there was no fish there. He said, "O. K., where do you want to go?" I told him, "I don't know." He said, "Well, I know you want to go to Empire, where you can catch the most fish at." I said, "That's all right, too." So he give me the W. M. Webb.

Q Did you fish the W. M. Webb just out of Empire or did you also fish it out of Morehead City?

A No, I only fished the W. M. Webb out of Empire.

Q Just out of Empire?

A That's right. I only fished the George R. Wallace up here. That's the only one I ever fished, captain, up here. The W. M. Webb, I fished it down at Empire. My boat went to the bad and I went to Patterson and got the C. P. Dey and fished her.

Q Was that with Patterson Menhaden Company?

A No, that was Wallace Menhaden out of Empire.

Q Still Wallace Menhaden out of Empire?

A That's right.

Q Have you been captain since that time?

A No, I haven't been captain since '58. I have been going as mate since then.

[12] Q Which captain have you shipped with since then?

A Lonnie Johnson.

Q Which boat has he been on?

A When I went back with him he was on the Sea Lever.

Q Was that a Wallace boat?

A That's right.

Q Has he been on a Wallace boat ever since then?

A Yes sir.

Q When did you first fish on a Wallace boat?

A I'm not sure but I believe it was somewhere along about '36, somewhere.

Q Then, you have always been fishing a Wallace boat?

A With the Wallace Company.

Q Right.

A I have fished with other companies. I have fished with Mr. Potter here and I have fished with Mr. Smith.

Q How long did you fish with them?

A I fished with Mr. Potter, I'd say, around two or three summers.

Q How about Mr. Smith?

A I have fished with Mr. Smith around four, Lewis, Delaware.

Q Otherwise, that's about seven years since 1936 that you didn't fish with Mr. Wallace, that you fished with somebody else?

A That's right.

[13] Q That's all the questions I have.

CROSS-EXAMINATION

BY MR. LYMAN:

Q When the company said they fixed a number of men to take in a season, 18, did you ever carry any less number sometime when you couldn't get a crew?

A Sometimes we would go with less, yes sir.

Q Did you ever carry any more?

A Yes sir, sometimes we would carry more, if the crew wanted more.

Q The crew would have to hire any man over the number as fixed by the company?

A That's right.

Q And that was up to you, as the captain, whether you took less men or more men?

A That was up to all of the crew members. I would bring it up with them, if they wanted to carry extra men.

Q The company didn't interfere?

A No, the company didn't have anything to do with that. That was when we were carrying 24 men, not in later years when we had these power blocks 17 men is the amount of men over all. They don't allow you to carry any man over that. When I was captain, if my memory serves me right, there were about 24 men to the crew. Then we were pulling everything with our hands and so we'd always feel like it would help us to get [14] one man and so we would get one man or if we wanted to get two men, why we would get two men. We would pay them two men. We would figure it up in equal parts from the captain right on down, everybody paid that man's share. But since they have changed to power blocks, why, they don't allow you to carry but 17 men.

Q When was that changed?

A I tell you the truth that was during the time that I left from fishing. I left fishing in '58 and didn't come back to fishing again until '64. That was in between that. What year it was, I couldn't tell you. It was in

between '58 and '63 because I went back in '64 and I have been fishing every summer since then.

Q This Potter that you fished for, he owned some menhaden boats in this area?

A That's right. He used to have a plant up at the Beaufort side.

Q This is Harvey Smith that you were working for?

A That's right.

Q That was toward New Jersey and Delaware?

A I fished with him right here at home, and Beaufort, I fished with him there. Then, after I was at Lewis, Delaware just like we all would change to a better job and more money, why, they all said it was better fishing at Port Mullen(?), New Jersey than it was at Lewis, Delaware. In other words, we have got an every day fishing ground there. We have got two [15] sounds and then outside. If it would blow in the outside we would go in the sound and fish the sounds. Therefore we would catch a lot more fish there. So, Lonnie got a boat in '51 and so I was fishing to Lewis, Delaware, so he begged me to go mate with him on the Silver Star. So I went. I fished with him that year but I have been with Wallace ever since. I had been fishing with Wallace before that.

Q So then you did fish from Wallace boats one time, then you went to fish menhaden boats for people other than Wallace for about five or six years?

A That's right.

Q Then you came back to Wallace?

A That's right and I am still with Mr. Wallace.

Q You make a new arrangement every season?

A That's right. If I had one who was lazy and wouldn't work, why, I wouldn't have him back next

year. A man on a job and he ain't going to work why you don't want him, so I always tell them when I go to hire my crew. I hired my crew out and out.

Q Well, it's up to the captain to move a man up or down the scale of pay, that is, give him new responsibilities?

A That's right.

Q The company didn't interfere?

A That's right, the company doesn't interfere at all. If we [16] want to give him all of our pay, they don't say anything. I just mark, pay this man so much. I always pay if I got a real good man, he can do anything aboard, I always give him one to two cents more. In fact, I have given my mate 20¢, my pilot 20¢, and the pay scale was 15½ and the 4½¢ was out of my money. Then my other crew members was the same way, in order to keep him satisfied and keep him throughout the season with an old piece of boat, why I'd give him some of my money to make him feel good.

Q The company, then, had a suggested pay scale but you could change it by paying him out of your own pocket if you wanted to?

A Oh yeah, they would give us a pay scale before we leave. In fact, I already have an idea from the last year about what the crew member would be, so sometimes I would hire 24 and sometimes I would wait until I got down there because sometimes I could find a better man that knowed me down there so I'd wouldn't carry all of them. When I got down there they were just like bees on the water, they'd know me and want to talk, so I'd hire them. They always give you the captain, the mate, dry boat and

cook, chief and your ring setters and it was on the scale what each man's pay was. They didn't tell you not to hire one man or go with less but whenever a man would lay out like a man would have [17] a big pay day and go up town and stay, why, a lots of times we have to stay at the dock because you couldn't go fishing without another man. Along then with 24 men to a crew and you pull with your hands, if it's like it is now you couldn't go fishing. If you'd just leave your power blocks off with .. men, you couldn't go fishing because you wouldn't have enough men. We have gone out with 19, 20 and do pretty good because every man pulls his part. Everybody goes and works just as easy as them 24 and 25 because everybody knows you have to keep going to get it. We have to work with our hands. I worked right along with them, always have, captain or no captain.

Q The captain and the mate would work right along with them?

A Yes sir, right along with them. I have had when I was captain a boy, who is dead now. He was lazy but I liked him and he was young. He was from my home and we was raised up together. He was lazy and wouldn't pull so when we would web our fish up and get him in a short corner and come along aside the big boat, I would say, "Freddy, pull," and he wouldn't pull so I'd get out of my boat and get right in his boat and get right between him and the man and I'd pull. When I got ready to pull I would reach right over and get a whole mouthful of his shoulder with my teeth. He'd say, "Turn me a loose, I'll pull," and so I turned him loose. So, that's what we usually do. The company didn't [18] have anything to do with

who you hired, who you fired. If you fired him you call in and tell them to have his time ready. They didn't tell you to keep him. If I found him doing something I didn't want him to do why I fired him. If he won't work, I don't need him and I fired him. It's best to treat them all alike. If I kept that man and he didn't work the other men would say, "I ain't going to work." When a man is over a good man you go along with him in a whole lot of things but when they get overbearing then it's different.

Q No one was guaranteed any money if he didn't catch any fish?

A No sir, he went on percentage basis. I haven't heard the company but I have heard the superintendent say if they didn't catch any fish they would pay the grocery bill, but they weren't guaranteed any money.

Q Was there ever a situation where you didn't catch any fish and you had a grocery bill outstanding?

A Yes sir.

Q Did they take it off against the next catch?

A No sir.

Q The company would stand for that?

A Yes sir. We have fished in '55 at Ferndina Beach when I was captain of the George R. Wallace, Lonnie had the Simpson Brothers, Captain Harry had the Admiral and Captain Fred Foster(?) had the Commander; and the four boats fished. We [19] went as far east as we could. We looked for fish from March until sometime about the middle of July and we only caught 12 millian and some fish, the four boats. We fished and caught everything we could catch and only got 12 million out of the four boats. We didn't

make no money and was behind in a whole lot of grub bill and the company paid that. That was one time, but I have known a lot of times that they would pay the grub bill at the end of the season and the boat was in debt for grub so they paid it. That was it, the company paid it.

(COUNSEL AGREED TO WAIVE SIGNATURE OF WITNESS)

NORTH CAROLINA
EDGECOMBE COUNTY

I, MILDRED DAVIS MAYNARD, being a Notary Public for the State of North Carolina, do hereby certify that I sat in the office of Wallace Fisheries Company, 704 Arendell Street, Morehead City, North Carolina, at 10:50 A. M. on the morning of April 3, 1967, in the above entitled cause and the questions and answers recorded above were recorded by me and reduced to typewriting.

I further certify that I am neither counsel nor solicitor to either of the parties and that I am in no way interested in the result of this action.

Witness my hand and official seal this 28th day of April, 1967.

(SEAL)

(Signed) MILDRED DORIS MAYNARD
Notary Public

My Commission expires:
November 12, 1967
(SEAL)

DEPOSITION OF HIRAM HANKINS

United States District Court
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Incorporated, Et Al,
Plaintiff,

vs Civil No. 15170
Division "D"

United States of America,
Defendant

and Consolidated Cases

The deposition is being taken pursuant to notice.

Appearances: Mr. Robert L. Waters, Attorney Tax Division, Department of Justice, 418 United States

Courthouse, Fort Worth, Texas, representing United States of America; Mr. Joseph J. Lyman, of Washington, D. C., representing the plaintiff.

The witness, after having been duly sworn, testified upon examination by Mr. Waters:

Q Mr. Hankins, would you state your full name for the record, please?

A Hiram Hankins.

Q Where do you live, Mr. Hankins?

A Right here in Morehead City.

Q How long have you lived at Morehead City?

A I would say around 40 years.

Q How long have you been a fisherman?

A All my life, the whole 40 years.

Q Has most of your experience in the fishing business been fishing for menhaden?

[2] A That's right. Not all of it; I have trawled some in the winter but always menhaden through the summer time.

Q Have you always worked for the same company in the menhaden business?

A Practically.

Q Has that been for the George Wallace interest?

A Yes sir, I have been with him, I reckon I would say 40 years.

Q How long have you been a captain, Mr. Hankins?

A I would say about 20 or 21 years.

Q Before that, what were you?

A Mate.

Q I suppose you started out as a crewman?

A Yes sir.

Q What boat are you fishing now?

A The Sea Fox.

Q What boat did you fish before the Sea Fox?

A The Sea Hawk, no, no, the Singing River.

Q How long have you been fishing the Sea Fox?

A I fished the Sea Fox four years before I went on the Sea Hawk. I stayed on her two years and I am going back to the Sea Fox.

Q Otherwise, you started fishing the Sea Fox about ten years ago?

A That's right.

Q And you fished the Singing River before that?

[3] A I fished the Singing River, oh my God, I can't name all their boats.

Q If you remember, were you fishing the Singing River in 1956? That's just about the 11th year ago, now.

A I am most sure I was, most sure.

Q Was the Singing River owned by W. M. Webb, Incorporated?

A No, I believe she was an Empire Menhaden then, but changed. I believe that's what it was.

Q Did you fish that boat out of Empire?

A That's right.

Q And you always brought the catch back to Empire Menhaden Company?

A That's right.

Q Did you fish the Atlantic Coast?

A Yes sir.

Q Did you also fish the Gulf Coast?

A That's right.

Q How was it determined which place you'd fish,

Mr. Hankins? Who decided where you would fish?

A I decided that.

Q Was the season going on on the Atlantic Coast at the same time it was going on in Louisiana?

A Not in the summer time, it wasn't. We could just fish in the fall of the year, fished in Louisiana in the summer.

Q You fished Louisiana in the summer and Carolina in the fall?

[4] A Yes sir, that's right, used to but we don't do that any more.

Q You don't fish Carolina any more?

A No sir.

Q Were there some years when you fished Louisiana in the summer and then came back and fished Carolina that same fall?

A Yes sir.

Q Would you bring the same boat back or would you leave one boat in Louisiana and then come back here and fish a different boat?

A I always brought the same boat back.

Q Who decided whether or not a boat would be fished, say if you were in Carolina or rather you were in Louisiana in the summer time? Who decided whether or not the boat would be brought back to Carolina to fish?

A That was the company. We had to decide whether we wanted to bring it or not.

Q Otherwise, the company decided whether the boat would be fished here but you decided whether or not, you would be the man who fished it?

A That's right. They didn't put us under no compulsion. We decided that.

Q Otherwise, they didn't tell you to bring the boat back?

A They didn't make us. We used our own judgment on it.

[5] Q Did the company ever offer the opportunity to bring a boat back up here that you decided not to do, you didn't want to fish for some reason?

A No sir.

Q Captain Hankins, was it understood that you could gather your own boat crew?

A That's right.

Q Would you tell me, briefly, how you went about doing this?

A They'd tell us when they were going to start fishing and we would go hire our own crew.

Q Would most of your crew for this year be people who fished with you last year?

A Some of them and some of them were some new ones.

Q Did you pass upon the qualifications of your own men, so far as who was suitable for being an engineer or who was suitable for being a mate?

A Yes sir, I had all that responsibility.

Q Otherwise, if you were satisfied that he was a capable engineer you were free to go ahead and hire him?

A Yes sir, all that was left up to me.

Q In so far as deciding, say you were fishing the Carolina Coast out of Morehead City during the fall season, was it up to you on a day to day basis as to where you would fish the boat?

A Yes sir, it was up to me. I was in charge of the whole [6] thing, whether I decided to go or whether I

felt like the weather was right; I'd go or I wouldn't go. The company didn't have nothing to do with it.

Q How was it determined how much you would be paid?

A We were getting paid on a percentage.

Q Did they fish a number of dollars and cents per thousand weight before the season started or did they simply pay you a percentage of the catch?

A They paid us a percentage on the catch. We get so much on a thousand.

Q Otherwise, they fixed a particular number of dollars and cents on the thousand weight of fish you caught?

A That's right.

Q Did the company set out any rules in so far as how much the different members of the crew would be paid, I mean the engineers would be paid such and such an amount, and the mate would be paid such and such an amount and the cooks?

A That's right, we have a pay sheet.

Q You have a pay sheet?

A Yes sir.

Q Before the season starts every year, when you are getting ready to start your season and you put your crew together, did you always go by the company office and give them the names of your crew members, etc.?

[7] A Go by the company office?

Q Yes?

A Yes sir, we always done that.

Q Did you fill out, or have your crew members fill out, the necessary tax forms, etc.?

A Yes sir.

Q You did this once a year, every year, before you started the season?

A Every year we have to fill that out.

Q Was it your understanding that the catch was to be brought back to the Wallace Fisheries Company?

A That's right.

Q Did you have some sort of bonus arrangement with the company that they pay some couple of cents bonus to the crew at the end of the year?

A That's right.

Q Was this bonus paid only to the members that finished the season?

A That's right.

Q Otherwise, if you had a man who fished only half the season and left, he wouldn't share in the bonus?

A Yes sir.

Q Was the same bonus paid to all the different boats?

A All that I fished on.

Q Otherwise, within the fleet?

[8] A Yes sir, but I don't know about these other people but Mr. Wallace always did.

Q Captain Hankins, were you responsible for provisioning the boat on a day to day basis?

A That's right.

Q Where did you get your fuel?

A The fuel, we got it from, I forget the man; he runs the oil dock down there. I know the man's name but I can't call it.

Q That's not important. You always got our fuel at the same place?

A Yes sir, all the time.

Q Did the company tell you to get your fuel at the same place?

A No sir, you had to use your own judgment as to where you wanted to stop at. You had your free privilege to get it where you wanted to.

Q You indicated, Captain Hankins, that you changed boats a couple of times?

A Yes sir.

Q What was the occasion for changing boats?

A Larger boats.

Q Did the company offer you a larger boat or did you ask for it?

A I asked for it and they gave me a larger boat.

[9] Q Did this permit greater catch?

A It all depends, you know, it all depends on the fish.

Q But this is the advantage of having a larger boat?

A That's right, bigger catch.

Q Depending of course, on if you have the fish to catch?

A That's right.

CROSS-EXAMINATION BY MR. LYMAN:

Q Mr. Waters asked you who decided when to bring a boat, say, from Louisiana to the Atlantic Coast to fish; who decided on where you were going to fish, and I believe you said it was the company.

A When we was bringing boats the company would ask you if you wanted to take that boat out, would you take that boat out.

Q But actually it depended upon if there were any fish?

A That's right.

Q If there were no fish there, it didn't make any difference?

A No sir.

Q I believe you made the statement, "It all depends on the fish."

A That's right.

Q And that's where you'd fish, is where the fish are?

A That's right.

Q Not what the company necessarily says?

[10] A No sir. We go where we feel like the fish is at. The company don't tell us to go, when to go, and when to come, nothing like that. We use our own judgment, the best we know how.

Q When a season is over, though, and there's no fish; there's no point in staying around?

A No sir.

Q That's all I have.

RE-DIRECT EXAMINATION BY MR. WATERS:

Q How long does the season usually last?

A Well, that all depends on the weather. We mostly fish by the weather. Normally, I would say the last of September or October, normally the weather is getting bad and we generally come on home. It all depends on the weather.

Q What do you do in the off season?

A Off season?

Q Yes, when you are not fishing menhaden?

A Well, I mess around hunting.

Q Do you have a lot of free time during the off season?

A Yes sir.

Q Do you work pretty hard during the season?

A Yes sir.

Q Otherwise, since you have got a limited season, as long as [11] there are fish to be caught, you are willing to go out after them?

A Yes sir, as long as there are fish to be fished, as long as the weather permits.

(COUNSEL AGREED TO WAIVE SIGNATURE OF WITNESS)

[12] NORTH CAROLINA
EDGECOMBE COUNTY

I, MILDRED DAVIS MAYNARD, being a Notary Public for the State of North Carolina, do hereby certify that I sat in the office of Wallace Fisheries Company, 704 Arendell Street, Morehead City, North Carolina, at 9:15 A. M. on the morning of April 3, 1967, in the above entitled cause and the questions and answers recorded above were recorded by me and reduced to typewriting.

I further certify that I am neither counsel nor solicitor to either of the parties and that I am in no way interested in the result of this action.

Witness my hand and official seal this 28th day of April, 1967.

(Signed) MILDRED DAVIS MAYNARD
Notary Public

(SEAL)

My Commission expires:
November 12, 1967

DEPOSITION OF LARNEY ARLING JOHNSON

United States District Court
Eastern District of Louisiana
New Orleans Divistion

W. M. Webb, Incorporated, Et Al,

Plaintiff,

vs

Civil No. 15170
Division "D"

United States of America,

Defendant

and Consolidated Cases

The deposition is being taken pursuant to notice.

Appearances: Mr. Robert L. Waters, Attorney Tax Division, Department of Justice, 418 United States

Courthouse, Fort Worth, Texas, representing United States of America; Mr. Joseph J. Lyman, of Washington, D.C., representing the plaintiff.

The witness, after having been duly sworn, testified upon examination by Mr. Waters?

Q Would you state your full name for the record?

A Larney Arling Johnson.

Q Where do you live, Mr. Johnson?

A I live between Shallotte and Supply.

Q That is here in North Carolina?

A That's right, North Carolina, Route 1, Box 176, Shallotte, North Carolina.

Q How long have you lived in North Carolina?

A All of my life.

Q How long have you been in the fishing business?

[2] A Since 1934.

Q Has that all been menhaden fishing?

A Just about all of it.

Q What other type of fishing have you done?

A I used to shrimp.

Q Have you worked for the Wallace interest most of the time you have been menhaden fishing?

A Most of the time with the exception of '51. I believe I fished a boat for Mr. Harvey Smith and right back with Mr. Wallace in '52.

Q How long have you been a captain for Mr. Wallace?

A Since '52.

Q Would you give me the names of the boats that you have had as a captain?

A The Grecian George, Simpson Brothers, Jack T. Styron, The Admiral, and the Sea Leader.

Q Do you remember which boat you had in the 1956 season?

A The Jack T. Styron.

Q Did you fish that boat just out of Louisiana that year?

A If my memory serves me right, I believe we fished that boat for a while out of Ferndina Beach, Florida and then on to Louisiana. I believe that's the way it was.

Q Who made the decision to fish Ferndina Beach, Florida?

A The company always tells us where to go, which plant to work out of.

Q The company always decides when to start the season and [3] which plant to work out of?

A That's right.

Q Once you get there you decide where you are going to fish?

A Yes sir.

Q How long in advance of the season's start does the company make you an offer for a boat?

A It varies, but it's plenty long enough for you to notify your crew. Your crew knows what you are going to get. We have a payroll scale. I have had one for about two months.

Q In advance of the April season or fishing season, you have had your payroll schedule for a couple of months?

A That's right.

Q This enables you to get your crew together?

A Yes sir, because when you go to hire your crew man, that's what he asks.

Q When the company puts out this pay sheet it

tells you what the pay is going to be per thousand weight of fish. Is that right?

A That's right.

Q Does the company send you transportation money to get you and your crew down to where you are going to fish?

A That's right.

Q Has this always been done? Have they always provided you with your transportation?

A It has since we haven't been carrying boats down. If we had a boat here, if we were going down we would go on a boat, if not, they always give you transportation. You [4] never had to pay your own transportation to work.

Q Were there some years, when they still had the fish plant here, that you would fish a boat here and then in the spring take it down to Louisiana?

A That's right.

Q How many different fish plants have you worked out of in the years since you have been working for Mr. Wallace?

A I don't believe I have worked out of any excusing the one here, and the one in Cameron, and probably Empire some time last summer.

Q And that one short period at Ferndina Beach?

A Yes, sir, that's right. They used to have a plant at Mayport, Florida.

Q Did the company always tell you that you were supposed to bring your catch back to the plant?

A That was understood.

Q Did you ever sell at another place?

A I haven't ever.

Q Did you decide how long your trips were going to last and where you were going to fish?

A Yes sir, that's right. It was entirely left to me.

Q Did they offer you any assistance in finding out where the fish were running?

A Lately they have had planes to spot fish.

Q Spotter planes?

A Yes sir. They would let us know if there was fish and it was still left up to us to go where we wanted to go.

[5] Q Did the captains fishing out of one plant share information as to where they were catching fish? Did you use your radio to tell other captains where you were catching fish?

A Right.

Q Did the company tell you to do this or was this left up to you?

A That was what the radio was put on there for. That is what I understood.

Q Did the company also have some sort of bonus arrangement wherein if you stayed the entire season?

A Right.

Q Was that always announced in advance too?

A Right.

Q Before the season began they announced they were going to offer a bonus?

A Right, it would be on the pay roll sheet.

Q Would this always be a certain number of cents per thousand weight of fish?

A Right.

Q Would it always be the same number of cents?

A I have not experienced it varying. The only time that I know that the men got more than what they were

actually expecting was this past season. They gave them three instead of one cent on the payroll. This time it is for three cents.

Q When this pay sheet comes out were you expected to pay your men according to the scale?

[6] A I have to.

Q Can you pay them any more?

A If I pay them more it comes out of mine.

Q It came out of your share as captain?

A Right.

Q Are you actually required by the company to pay them at least that much?

A Sure.

Q You can't pay them less?

A Whatever is on the pay sheet, because I never changed a man from what is on the pay sheet.

Q Did the pay sheet also say what size crew the company wanted you to carry every year?

A Right.

Q Would this change from year to year?

A They have changed, yes, because before they got those modern things we always carried more crew than we have now. We have carried from 24 to 26 men in the crew. They have varied a lot because we have the power blocks now. We have been fishing the last few years with 17 men.

Q Do you have the authority to hire anybody extra? If the pay sheet says 17 crew, can you hire an extra man?

A As of now, we can't.

Q But in times past you could have.

A I could if we got in touch with the crew. The whole crew paid them. If I said get an extra man and

the crew consented, we would get an extra man and it would come out of the crew's [7] pay equally.

Q This would be strictly from the crew and the company wouldn't have anything to do with it?

A Yes sir, that's right.

Q You mentioned that you had fished several different boats, Mr. Johnson in the time you have fished for Mr. Wallace. What was the occasion for changing boats?

A For a better boat.

Q How did you qualify for a better boat?

A Well, I guess by the fish catch, so far as I know. I am just saying that because maybe you had a boat that wouldn't carry but 300 thousand and you get a chance to get one that would carry 500 thousand, you'd be glad of it and they'd try to give you a better boat as things move on.

Q Otherwise, as you proved your method as a fisherman?

A That's right.

Q What sort of arrangements did you have, Mr. Johnson, about where you would buy your fuel? Did the company tell you some place to buy the fuel?

A Never. That's one thing, the fuel and groceries, we always got it anywhere we wanted to. I'm not saying that there wasn't no place, probably, that the company wouldn't rather you use but they never would take our authority. They would always leave that with you for your groceries or fuel, anywhere you wanted them.

Q Was there anything else that you had to get in the way of [8] provisions, other than the groceries and fuel? Did the boat, otherwise, come fully equipped and ready to fish?

A Right, with the exception of ropes, which that would be furnished from a store room, themselves.

Q Who was responsible for the maintenance of the boat, for keeping the boat in good working order?

A Myself and the mate, I would say, and the engine room part belonged to the engineer. He would do that.

Q Did you ever have occasions when you would lose a net or lose some large piece of equipment? Who would be responsible for that? Would the company replace it?

A Right.

Q Was the company responsible for making all the repairs that had to be made to the boat?

A Right. Like a net would tear up, we could mend that. The company would hire net men, to have net men sometimes to mend our nets. If they couldn't mend it we would get a new one, still on the company.

Q No further questions.

CROSS-EXAMINATION BY MR. LYMAN:

Q The captain had to be responsible for things like personal gear, slickers, boots and gloves?

A He didn't have to but as a rule, when we go a place to fish, probably I would go to a store and find out if I could get my stuff, my gear for my men. If they said yes, [9] well all of my crew would go there and get their stuff and I would sign for it and after we make our fish catch I would be responsible for this money.

Q The crew would have to pay for it?

A Right, the crew paid for it.

Q About these extra men. Let me see if I under-

stand this. When you were pulling by hand you had sometimes 25 men?

A Right.

Q If the company said to carry 22, you could go out and hire three more men if you wanted to?

A Right.

Q Because you felt that three men could help you catch enough additional fish to pay for them?

A Right.

Q Now, the power blocks; I believe the company has indicated 17 men were sufficient?

A Right.

Q Now, an extra man or an extra two men could help you catch many more fish could they?

A Well, probably it could, probably it could at times. I'm speaking about myself. I find the extra men help me so much. Men when they are working, making pretty good, there are so many times that you are short one man. When you don't have extra men and just got enough, then when over two men are out you are in bad shape. If you have got a couple of extra men sometimes you would be carrving them.

[10] Q You say that the company finds that 17 men can work the power blocks?

A Right.

Q Suppose your 17 men showed up and they are all ready to go, would taking an 18th man along on that particular day's trip, would that catch more fish?

A I don't see where it would.

Q It would be useless to carry an extra man?

A Right. We are going to have 18 men this year.

Q Would there be any point in carrying a 19th man? Could he catch any more fish for you?

A Well, I don't see where he could any more than it would rest some of the men. This 18th man that they are giving this year, he won't go on the net, because he is a second engineer that will stay on the boat. If you have the 19th man, I would say, it would be a second problem, on a long run. It gives a man more resting time.

Q If you took a man on now it would be to spell another man?

A Right.

Q Rather than help you catch fish?

A Right.

Q When you say the company decided to fish the Jack T. Styron off Ferndina Beach, they only decided to fish when there were fish there, didn't they?

A Right.

Q They didn't tell you to go fishing when there weren't any fish. So it is really the fish that decided when the boat [11] would fish?

A That's right.

Q Now, Mr. Waters was asking you something about a payroll sheet that was put out by the company that indicated what each man would get, whether he was captain, mate or the crew, indicated the amount of bonus that would be paid that year; but there was no guarantee that anybody was going to get anything unless you caught fish?

A That's right.

Q So at the end of any pay period, which would be at the end of two weeks, your pay checks or whatever money you drew, whether it was cash or check, was never the same. Was it?

A No sir. It was just a rare thing that you would

catch the same amount of fish every two weeks. It just varies. You get paid according to the fish you catch. Like you said, if you don't catch any fish, there is not anything.

Q So at the end of, say, four days of that two week period, if you had some catches there was a certain amount of money that belonged to you right at that point; didn't it?

A Four days catch?

Q Yes.

A Right.

Q Could you go in and draw that money if you needed it?

A Yes sir, I can.

Q The captain could?

A Yes sir, that's right. If a man needs money and he comes fishing up there, I always handle it this way. I go in [12] the office and let him know that a man needs some money. She will look up and see what his pay is and then see what his groceries is going to be and see if he has enough money to pay groceries and then clear so much money, but I can get it and give it to him. I can get it either way but still I will be the loser if he don't have enough money to pay for it.

Q So you don't have to wait two weeks before you can draw some money that you have actually earned?

A Oh, no sir. I usually get money every Saturday, practically all of your, what I call, blank Saturdays.

Q In other words you could go down on what you call a blank Saturday, on a Saturday when you were not actually being paid, and draw on money up to what the catch amounted to, less the groceries?

A That's right.

Q You said that the company would pay the transportation of yourself and the crew, if the crew lived up here, to Louisiana?

A Right.

Q Did you pick up men in Louisiana also?

A Sometimes.

Q But you couldn't count on getting, what you call, a satisfactory crew in Louisiana, itself?

A I don't find it pays off because if you do they are too close home. At times when you need them to fish, they are home.

[13] Q So you find it better, for your purposes, to bring your crew from here?

A Majority of them, if I can.

Q And that's the arrangement you have with the company, you tell them that if they will pay their way down you will supply the crew for them?

A Well, they don't have anything to do with your crew, with hiring the crew at all.

Q But your arrangement is that they have to pay the transportation?

A That's right.

Q But you may get down there and not even get paid because you won't catch any fish?

A Well, they get the transportation.

Q After they get there and they go fishing, there's no guarantee that they are going to be paid any money?

A That's right.

Q These radios, these are between the boats, aren't they? Is that the way the radios work?

A That's right.

Q In other words, one captain can talk to another?

A That's right and we can also talk back to the office.

Q Does the office have a connection?

A That's right.

(COUNSEL AGREED TO WAIVE SIGNATURE OF WITNESS)

[14] NORTH CAROLINA
EDGECOMBE COUNTY

I, MILDRED DAVIS MAYNARD, being a Notary Public for the State of North Carolina, do hereby certify that I sat in the office of Wallace Fisheries Company, 704 Arendell Street, Morehead City, North Carolina, at 10:50 A.M. on the morning of April 3, 1967, in the above entitled cause and the questions and answers recorded above were recorded by me and reduced to typewriting.

I further certify that I am neither counsel nor solicitor to either of the parties and that I am in no way interested in the result of this action.

Witness my hand and official seal this 28th day of April, 1967.

(Signed) MILDRED DAVIS MAYNARD
Notary Public

My Commission expires:
November 12, 1967

(SEAL)

[1]

DEPOSITION OF HORRIE OLDEN JOHNSON

United States District Court
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Incorporated, Et Al,
Plaintiff

versus Civil No. 15170
Division "D"

United States of America,
Defendant

and Consolidated Cases

The deposition is being taken pursuant to notice.

Appearances: Mr. Robert L. Waters, Attorney Tax Division, Department of Justice, 418 United States Courthouse, Fort Worth, Texas, representing United States of America; Mr. Joseph J. Lyman, of Washington, D.C., representing the plaintiff.

The witness, after having been duly sworn, testified upon examination by Mr. Waters:

Q What is your full name, Mr. Johnson?

A Horrie Olden Johnson.

Q Where do you live, sir?

A At Shallotte.

Q That's in North Carolina?

A Yes sir, Shallotte, North Carolina. That's about 40 miles south of Wilmington.

Q How long have you been engaged in fishing as a livelihood?

A Since I was 18.

Q That goes back several years, doesn't it?

A Yes sir.

[2] Q Has that been mostly menhaden fishing?

A All menhaden fishing. I have missed a few years

Q When did you first fish a boat for Mr. George Wallace?

A When I was 18. The first boat I went on was for Mr. Wallace.

Q How long ago would that be?

A It was 1928.

Q Have you fished continuously with Mr. Wallace since that time?

A No sir, I have missed a few years, you see, probably four or five years from then until now. Excusing that time, I have been on his boats or boats that he was concerned with.

Q Have you fished on anybody else's boats other than the Wallace interest?

A Well, yes sir, I was with Patterson Shrimp Company but it was still run by Mr. Wallace. I still felt like I was working with Mr. Wallace. Excusing that, I haven't never.

Q Are you still fishing with Mr.. Wallace?

A Yes sir, I expected to but my health went bad last year. I won't be fishing this year.

Q How long have you been a captain?

A 1952.

Q Would you tell me what boats you have had since you have been captain, Mr. Johnson?

A Yes sir. It might take a little time to get them.

I think the first one was the Citation with Patterson Shrimp Company, which was also [3] operated under Mr. Wallace.

Q When you worked on the boat with Patterson Shrimp, was it Patterson Shrimp or Patterson Menhaden?

A Patterson Shrimp Company was the name of the company at that time.

Q Did you unload your catch at Empire?

A No sir, at Cameron.

Q Was it at the Wallace Fishery there at Cameron?

A Yes sir.

Q Which boat did you have after the Citation?

A After the Citation was the Algarvio. It is a foreign name. They say that the proper name was Algarvio. I think this name came from Portugal. Captain John, it was Captain John's boat and he had it named after the state property and —

Q You mean Mr. Carinhas?

A Mr. Carinhas, Mr. John Santos Carinhas. It is spelled A-l-g-a-r-v-i-o, Algarvio. We called it Algovee.

Q Which boat did you have after the Algarvio?

A I can't think of it, one of those mine sweepers. Well, either one of those gentlemen could tell me if you would like to know. (Witness refers to gentlemen in next room.)

Q Go ahead and find out if you would, please?

A It was the Frenchman.

Q How long did you fish the Frenchman?

A One year.

[4] Q Did you move on to another boat then?

A Yes sir.

Q Which boat was that?

A We called it the W. M. Webb.

Q How many years did you fish the W. M. Webb?

A Two years.

Q Then what boat did you go to?

A The Sea Eagle.

Q Did you most recently fish the Sea Eagle?

A No sir, I fished the Sea Eagle up to two years ago then I fished the Sea Ranger. For the past two years I fished the Sea Ranger.

Q Do you remember what boat you would have been fishing in 1956? Would that have been the W. M. Webb?

A No sir, it wouldn't have been the W. M. Webb. Let's see now, I went on the W. M. Webb in 1958. In 1957 I was on the Frenchman. In 1956 it would be the Algarvio.

Q And that was for the Patterson Shrimp Company?

A Yes sir.

Q Could it possibly have been Santos Menhaden Company?

A That's right, it goes in that name, that's all the same, Patterson Shrimp Company, Santos Menhaden; they're all the same.

Q At any rate the boat was controlled by John Santos Carinhas, is that right?

A Yes sir.

[5] Q Captain Johnson, were you always responsible to put together your own crew?

A Oh, yes sir.

Q Where did you find your crew members? Were they people you knew here from North Carolina?

A Anywhere I knew a man and wanted to consider him as a crew member. Sometimes they came from

all over. In this fishing business there's a number of men that have been involved. Being in the business you meet different people and you know them. There are men who have fished with me from Baltimore, Mississippi, Alabama; just anywhere that I choose to take a man.

Q What would you do, just correspond with these people when the season was beginning to come up and put together a crew?

A That is correct.

Q And then when you found out the season was going to open, you just had your crew men meet you?

A That's true.

Q Did the company always send you transportation money to get to Cameron or to Empire?

A Yes sir.

Q Did you have to pay that back?

A Did I?

Q Yes.

A No sir.

[6] Q The company always bears that expense of transporting you down there?

A Yes sir.

Q What sort of understanding did you have, Mr. Johnson, about where you would take your catch? Did you always take it to the same fish plant?

A Generally, yes sir.

Q Did you have liberty to sell it to another fish plant, if you wanted to?

A No sir. Let me put it like this. If I did, I didn't know it. I was assigned to this plant and I had no reason to inquire about going to another plant. I don't know whether I had the liberty or not.

Q But at any rate, when you were working out of Cameron you always brought it back to the Wallace Fishery to the plant there?

A That is true, yes sir.

Q Did you ever work out of Empire?

A Yes sir.

Q And when you were working out of Empire you always brought your catch back to Empire Menhaden Company?

A Empire Menhaden Company, yes sir.

Q Before the season started did the company tell you what they were going to pay for the fish?

A Yes sir.

Q Did that pay hold up for the whole season?

A Yes sir.

Q Would that be so many dollars and so many cents per thousand weight of fish?

[7] A Yes sir.

Q Did the company put out a pay sheet?

A Yes sir, they furnished me one every year.

Q They furnished you a pay sheet?

A Yes sir.

Q Tell me what part this pay sheet played in so far as how you determined what your men would make?

A I couldn't possibly be successful in hiring my crew until I got my pay sheet. Like I say, I lost my health and I'm not going back this year but I didn't know and the company didn't know that a few months earlier. I have my pay sheet for this year because they was expecting me to come back. In this respect, when I went to hire a man I knowed what to promise him because I had the pay sheet.

Q Could you change the pay? Otherwise, if the pay

sheet said so many cents per thousand weight for an engineer, could you actually pay more than that?

A Yes sir, in one way.

Q How is that?

A Take it out of my own.

Q In other words, it came out of the captain's share?

A That's right.

Q That's the only way you could change it?

A That's right. I would like to add this. In several cases, after the pay sheet was made up, each man was assigned to a certain amount of [8] money. You had two or three cents, maybe four or five cents, extra that was left to you to give to anybody you want to. I could make that change, within that boundary generally; but other than that I couldn't charge it unless it came out of my pay. I would like to also add this. I was never able to pay a man less than what the pay sheet said.

Q You always had to pay that?

A I had to pay that. If I wanted to increase it, it was all right, but I couldn't pay any less.

Q You mean sometimes, though, for instance if at the start of a season, just to take a figure, they said they were going to pay 2.58 a thousand and yet the total figures that they gave you was so much for your engineer, so much for your mate, etc., only added up to 2.53, then you would have five cents a thousand to do what you wanted with?

A It wasn't like that .

Q It wasn't like that?

A My rate couldn't be but so much. That money had to be disposed of among the crew, because that was strictly. My rate was set and I was notified by letter

that it could not be increased but it could be decreased. I could have been the lowest paid man on the boat if I wanted to give it away, but I could not increase it. That had been all the way through the picture.

Q Did you make out payroll information every couple of weeks telling how many fish this man would participate in and what rate, etc.?

[9] A Yes sir, every week end and in some cases we did that every day.

Q How often did you get paid?

A Every two weeks?

Q The company paid you every two weeks?

A That's right.

Q Before the season started, did you have all your crew members fill out the with holding statements and social security tax forms, etc.?

A Yes sir, I had orders that those men would have to fill that out before they received their first pay check.

Q Otherwise, they couldn't get paid the first time until they turned in that information?

A That's right.

Q Mr. Johnson, how did you decide whether or not you were going to fish the Carolina or whether you were going to fish Louisiana?

A Well, the company decided that.

Q Otherwise, the company would say we are going to fish so many boats in Carolina for these months?

A Well, those boats is usually assigned to a certain place and the company would make me an offer during the off season, which is the winter months; that, "we have the", I'll say the "Sea Ranger," "available this year, do you want it?" When I accept the boat why I

know where I am expected to go along with it because I know where she is assigned to go.

Q Otherwise, you know the Sea Ranger is going to fish out of Cameron?

A That is right.

Q And you are going to fish through the Louisiana Gulf Coast?

[10] A That's right.

Q Of course that traditional season?

A That's right. A good many of those kind of things I didn't have to ask questions about, because I was raised in the company and I understood how those things went.

Q Did the company also fish off the Carolina Coast?

A At times.

Q Did you ever fish on company boats off the Carolina Coast?

A No sir.

Q You always fished off the Louisiana?

A Yes sir.

Q How did you, on a day to day basis how did you decide where you would fish?

A Well, directly that's kind of hard to explain. That would mostly depend upon your opinion, from your past experience.

Q Did they have any way of helping you decide where the fish were?

A No sir, no sir. The only help that I would get from the company would be repairs to the boat that I thought necessary and convenient for the crew. The other problem was mine.

Q Did they use spotter planes at all?

A Yes sir.

Q Would they pass this information along to you as to where they were finding fish?

A Yes sir, that's right, but I still didn't have to go where they found no fish. If I wanted to go some other place, I did; but if the end of [11] the season come and I hadn't caught no fish, then that would be the company's business then, to get somebody else.

Q Otherwise you were expected to produce fish?

A Well, I had to. That's the only way I kept my job. I would like to add this to make it plain. They left it in a way that you could cut your own throat. They didn't tell you where to go, when to come, that was up to you; but at the end of the season if you hadn't produced as they thought you should, why then that was up to them to get somebody else.

Q Otherwise, they just wouldn't offer you the boat next year?

A That's what I presume, although they haven't took one from me so far.

Q Did you know of specific instances where they did take a boat away from a captain?

A Well, I've known men to be on boats and get off of them. Why, I don't know. I am only taking care of my own business.

Q Did they have some sort of bonus arrangement too, that you got some bonus pay at the end of the year?

A Yes sir.

Q How did that work?

A That was a percentage on each thousand. That also came out with the pay sheet. It was stated and in a good many cases I would explain it to my crew and tack it in the galley where it could be seen, just how

it reads and what percentage you would get on per thousand.

Q You mean they would announce this before the season started?

A I got it in black and white, the pay sheet, and then it would be to me [12] to hand it over to my crew. Each man knew what he would get. I knowed what I would get.

Q Did you ever ask to be changed on boats, to go from one boat to another? Did you ever ask the company to give you a different boat next year?

A I don't believe I did, but I understand that this company has always had a policy to put a man where they thought he was supposed to be. Say, if I was in No. 2 bracket this year and I qualified for No. 3, if they had anything available in No. 3 they would make the offer and it would be up to me to accept.

Q You mean they have different classes of boats?

A Oh, yes sir.

Q And if you were fishing in a class 2 boat and they thought you were good enough for a class 3 boat they might make you an offer for a class 3 boat next year?

A Yes sir, but in lots of cases people ask for a change. In my case I always waited for the offer but naturally if it was better I always accepted it. If they are half way satisfied with you they are not going to ever offer you something worse. They are always going to offer you something better. So that's what made the different change I made on these different boats.

Q But this depends on how well you fished your boat last year?

A Well, maybe I shouldn't answer that question. Of

course, I know that's true but I am talking in the other man's business when I say that.

Q You have observed these things. You have observed other captains moving from one boat to another?

[13] A But I don't always know why. I have good thoughts, but.

Q Did the company tell you where to buy your supplies?

A My supplies?

Q Yes, so far as your fuel was concerned?

A That was furnished.

Q Yes, but I mean so far as which store you bought it from?

A The fuel?

Q Right.

A The fuel was right on the dock.

Q You mean the company had its own fuel dock?

A Well, that's another question I think I better not mess with. If you could take my thoughts I'll explain but I really believe the company allowed the oil company to put its tank on the dock and supply the boats, but I don't know about that.

Q But, at any rate, you didn't shop around for a place to get fuel?

A No, there was arrangements made on the dock for me to get fuel. But, now in case of traveling, I had to go to a ship yard or had to go away and run short of fuel, why, I bought fuel any where I could find it and they had nothing to say about it.

Q What about your groceries? Where did you buy your groceries? Was that up to you?

A Yes sir.

Q But you just had your cook buy groceries some place suitable to him?

A No, it would be suitable to me, what I thought would be to the best [14] advantage of the crew.

Q And he would charge them to the boat and have the bill sent back to the company?

A I might better answer what I know. I don't know who it would be charged to. I would just go and tell the people I wanted the groceries and they would let me have the groceries and the company would pay for it, but it was understood that that would come out among the crew.

Q Otherwise, it would be charged against the crew's money?

A Oh yes, that was understood to start with that we would pay for our own groceries, but who the store would charge it to, I don't know. I didn't ever have that problem.

Q Did you ever have a bad season where you just caught so few fish that you ended up, the crew ended up, owing food money, owing grocery money at the end of the year?

A Yes sir.

Q Did you have to pay that the next year or did the company take care of it?

A No sir, I never went back and had to pay something that was left from last year in all my experience of fishing, even before I made captain.

Q They wiped the slate clean at the end of the year?

A I don't know what they did with it but I never was concerned with it but I am sure they paid it off, that's natural.

Q Did the company ever tell you to get rid of a crew member?

A No sir.

[15] Q That's strictly up to you as a captain?

A That was entirely up to me. In fact, what the company did is just put me in charge of the boat. As far as I know if I waked up Monday morning and didn't want to go to work, if I would lay up at the dock and sleep, I don't know if the company would have said anything. That was still my problem.

Q You just had to answer at the end of the year? Is that right?

A I would have to answer sometime. I don't know when it would be. Otherwise, it was entirely up to me to operate the boat.

Q I have no further questions.

CROSS-EXAMINATION BY MR. LYMAN:

Q Mr. Johnson, Mr. Waters asked you did the company decide whether the boat would fish in Louisiana or fish in Carolina. Actually, didn't it depend upon where the fish were whether a boat fished or not?

A Well, I am sure it would. I am sure it would.

Q The company didn't make it; the fish made the decision?

A Well, yes sir. I sure thank you for that. That was an error on my part. Yes sir, I thank you for that. Naturally since you know my mind, if there was a fish on the Jersey Coast they wouldn't go to Louisiana. There wouldn't be any there. The fish is what made that decision, yes sir.

Q You say that the company paid you every two weeks. When you say that did you ever get the same amount of money every two weeks?

[16] A No sir.

Q It was always something different, wasn't it?

A It would always depend on the catch.

Q It isn't something like you'd get a salary like you were working in an office or a factory where you would get a check in payment every two weeks?

A No sir, we got paid according to the pay scale and the pay scale didn't state any salary.

Q So let's asume you were paid every week, that they paid you every Saturday it still wouldn't have been the same, would it?

A No sir.

Q If they paid you once a month, it would never be the same?

A No sir.

Q If they paid you every day, it would be something different every day, wouldn't it?

A Yes sir, that is true, that is true.

Q So the fact that you get paid every two weeks, or every day, or every month; the amount was always something different?

A That is true, yes sir.

Q When you say that the company paid you every two weeks, this was money that you had earned and accumulated during the two week period that belonged to you?

A That is right.

Q And it could have been at the end of two weeks that you wouldn't be entitled to nothing?

[17] A That is true.

Q Even though you had put in maybe 16 or 1
hours a day working, you could end up with nothing
A Oh, that's happened several times.
Q And also you could end up with a nice amount o
money if you put in maybe four or five hours a da
with a big catch?
A That's true.
Q So that the weather, the run of the fish, and luc
determined what you were going to earn?
A That is true.
Q Along with hard work?
A Yes sir.
Q But you could work very hard and come up wit
nothing?
A Yes sir, that has happened.
Q You said that the company paid you transporta
tion money if you were up here and they wanted yo
down at Cameron. Is that correct?
A Yes sir.
Q Did you ever take a boat from here down t
Cameron?
A No sir, I didn't myself but I know of several
others.
Q Now, when you enter into your arrangement eac
season with the company, it's a set rate then how muc
you are going to get per thousand?
A That's right, before I leave.
Q It is also part of your arrangement that you are
to pay for your own groceries, if you have a catch?
A Yes sir.
[18] Q It is also part of your arrangement that you
have got to pick up your own crew and you can't look
to the company for any help?

A That is true.

Q And once you are on the boat and you start the engines up and you leave the dock, who decides which direction you are going to go to fish?

A The captain.

Q When the company offers to give you a boat which moves from, say, class 3 to class 2, class 2 to class 1, it is put up to you, is it not? You can refuse if you want to?

A Why sure.

RE-DIRECT BY MR. WATERS:

Q Did the company tell you what size crew to carry?

A Yes sir.

Q Otherwise, they would prescribe a particular number to be in the crew and would that sometimes change from year to year?

A Well, this will take a little explanation. Three or four years ago our boats weren't equipped like they is now and we used up to 24 men in the crew. The boats are equipped now with what we call power blocks, to draw the net in. My pay sheet this year states 18 men in the crew so that naturally that would vary according to the equipment on the boat.

Q To the equipment on the boat?

A That's right.

[19] Q At any rate, when you got your pay scale at the beginning of the year, it would give you this information as to what size crew that they were going to use this year?

A Yes sir.

RE-CROSS EXAMINATION BY MR. LYMAN:

Q Before you got the power blocks that you are talking about, if you wanted to take more men than the company had listed on that sheet, you could take them, couldn't you?

A Yes sir.

Q It would come out of the captain and the crew's pay?

A Yes sir.

Q And you could take less men if you couldn't find a crew, also?

A That's right.

Q And that extra money would be sort of short money which would go to the crew?

A That's right. In other words maybe I could explain that a little clearer. Say for instance this year we are fishing and the set number in the crew is 22, all right, and maybe some of your men get less and you were able to go out with 15 and you make a good catch. You still got paid for 22 but that over money was divided equally among the crew. On the other hand in a lot of cases the crew members know that we have the amount of men that we are suppose to have but there is somebody else and they like his work and like to get along with him and want to give him a job. They say, [20] "Captain, let's take so and so and it won't take but two or three dollars to a man to pay that man. Let's carry him." See, you could go over or you could go under. The fish is what they wanted. As you know, a captain couldn't make, he's fully in charge, but he can't make all of those decisions himself. He has to

make them in a way that is satisfactory among the crew.

COUNSEL AGREED TO WAIVE SIGNATURE OF WITNESS

[21] NORTH CAROLINA
EDGECOMBE COUNTY

I, MILDRED DAVIS MAYNARD, being a Notary Public for the State of North Carolina, do hereby certify that I sat in the office of Wallace Fisheries Company, 704 Arendell Street, Morehead City, North Carolina, at 10:50 A.M. on the morning of April 3, 1967, in the above entitled cause and the questions and answers recorded above were recorded by me and reduced to typewriting.

I further certify that I am neither counsel nor solicitor to either of the parties and that I am in no way interested in the result of this action.

Witness my hand and official seal this 28th day of April, 1967.

(Signed) MILDRED DAVIS MAYNARD
Notary Public

My Commisison expires:
November 12, 1967

(SEAL)

[1]

DEPOSITION OF ALEXANDER DUDLEY

United States District Court
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Incorporated, Et Al,
Plaintiff

versus Civil No. 15170
Division "D"

United States of America,
Defendant

and Consolidated Cases

The deposition is being taken pursuant to notice.

Appearances: Mr. Robert L. Waters, Attorney Tax Division, Department of Justice, 418 United States Courthouse, Fort Worth, Texas, representing United States of America; Mr. Joseph J. Lyman, of Washington, D. C., representing the plaintiff.

The witness, after having been duly sworn, testified upon examination by Mr. Waters:

Q Mr. Dudley, would you state your full name for the record, please, sir?

A Alexander Dudley.

Q Where do you live, Mr. Dudley?

A 908 Bay Street, right here in Morehead City.

Q Mr. Dudley, how long have you been in the fishing business?

A I have been in the fishing business for about 40 years.

Q Has most of that been menhaden fishing?

A That's right.

Q Who have you worked for most of that time?

[2] A Mostly for this same company. Of course, I have worked for Smith one year but mostly for this company.

Q Have you worked for anybody other than Smith?

A Mr. Taylor. That was back there in '28's and '29's.

Q But other than those several years you have been with the Wallace interest?

A That's right.

Q How long have you been a captain, Mr. Dudley?

A Since '52.

Q Could you give me the names of the boats you have had since 1952?

A The first one, I believe, was a boat named Pete Cospus. The next one was the Algarvio.

Q What was the next one?

A The Beatrice.

Q What was the next one?

A I fished the Commander for one summer.

Q Have you fished another one since then?

A I am on another one now. I fished on the Sea Hawk up here and now I am on the Sea Eagle.

Q The Sea Eagle, did you fish it out of Empire, Louisiana?

A Yes sir.

Q In the years before you mentioned that you fished the Sea Hawk up here one year, that is here off the North Carolina Coast?

A That's right, in '62.

Q In the years before 1962 did you generally fish a boat off the Carolina [3] Coast during the winter months?

A No sir, I didn't fish no boat off the North Carolina Coast in the winter months.

Q Do you remember what boat you were on in 1956?

A I fished the Pete Cospus two years and the Algarvio two years. It would have had to be the Beatrice.

Q The Beatrice in 1956?

A It was '56 because I remember I was fishing the Beatrice in '57 the year they had the storm down there. In 1956 I was on the Beatrice.

Q Now, where did you fish out of that season?

A Cameron, Louisiana.

Q Before the season started did the company send you out a pay schedule?

A Yes sir, they did.

Q Did they do that back in 1956?

A Seems like to me—let me see now. I disremember where they did that or not. I tell you the truth, I am scared to say they did, but I don't know whether they did or not, I'm pretty sure they had to because I wouldn't know how to hire my men. I wouldn't know what to tell them I was offering them.

Q Did you hire your own crew?

A Yes sir. We had the privilege of hiring our own crew or firing them.

Q Was it on the basis of this pay schedule that you were able to tell your men what they were going to be paid?

A That's right.

[4] Q Did the company pay your transportation and

your crew's transportation from North Carolina down to Louisiana?

A Yes sir.

Q And the company told you when to report, what time of the year to come down?

A Yes sir. They'd tell us whenever the plant was going to be open in order to be there to start at the first of the season.

Q When you got there did you have complete freedom as the captain of the boat to determine where you were going to buy your fuel and where you were going to buy your groceries?

A Yes sir.

Q What about the other equipment for your men, their fishing equipment?

A Well, we could go any place they wanted to to get that.

Q Did the men have to pay for their own fishing gear so far as their clothing, etc.?

A That's right.

Q Was it your understanding that the catch was to be brought back to the fish plant there at Cameron?

A Yes sir.

Q Did you ever sell your catch at any other place?

A No sir.

Q Did the company tell you what size crew to carry?

A Well, they always selected men back there in the later years, why, we had to get in our nets by hand. We used 24 men but since they [5] have put the power blocks and stuff in why we only use 17 men. We cut down on the crew because the machinery does the work, you see.

Q But did the company decide what size crew you were supposed to carry?

A That's right.

Q Did you have some authority to get together with your crew and hire an extra man or an extra two men if you felt like you needed him?

A Yes sir, if we felt like we needed an extra man and it was willing with the crew to do that, why, we could do that but if not, why, we wouldn't bother.

Q Did the company pay some sort of bonus in those years?

A Yes sir, they paid a bonus. Yeah, they paid a bonus.

Q Did you know about the bonus before the season began?

A Yes sir, that came right out on the pay sheet.

Q You mentioned that you changed boats several times. What was the occasion for going one boat one season to another boat another season?

A That's to get a better boat .When I started out I started out as just a new captain.

Q Do new captains always get the smaller boat?

A Well, quite naturally you know when they are just trying a fellow out to see what he could do, then we got a better boat each year. They were looking out for us.

Q If you have a pretty good season do you ask for a better boat the next year?

A No sir.

[6] Q After you start fishing out of one particular fish plant, say Cameron, do you decide on a day to day basis where you are going to fish the boat? Is that up to the captain?

A That's up to the captain, wherever he can find the fish at, why, that's up to him. That's left strictly up to him. We go as far as we please until our mind is satisfied that we have gone far enough, then we turn around and come back. That's left entirely up to the captain.

Q Is it your understanding, Captain Dudley, that when you are offered a boat that so long as your performance is satisfactory, that the boat is yours to fish for the season?

A Yes sir, well, I haven't been off too much. I did stay and go home one time, which I have a mate, you know, that's the reason we carry another fellow. If we have to take off for a week why they just put him in charge, you know, until we return.

Q When you are offered a boat, it is generally offered to you for a season?

A Oh yeah, that's right, for a season.

Q But you understand you can quit any time if you want to?

A Yes sir. If I get dissatisfied I can quit any time.

Q Before the season begins every year, does the company require you to have your men fill out all the tax forms and social security forms, etc.?

A You mean before it starts?

Q Before the season starts?

[7] A Well, we have to fill out our withholding statement. You know they have to have that up to the office so we turn them in when we first go down there so they can get the social security number and all that down to the office.

Q That's before you get your first pay check?

A That's right.

CROSS-EXAMINATION BY MR. LYMAN:

Q Ordinarily you fish a boat for a whole season, for instance when Cameron has a season, say, from April to what, November?

A They used to start in Cameron in May, May 1st and on up to the 15th and then practically on up the last of October to the first of November.

Q If for some reason you didn't want to fish for a season, at the end of some two week period when the pay checks came out you could tell Mr. Styron that you didn't want to fish any more?

A Yes sir.

Q And somebody else would pick it up at that time and continue. Is that your understanding?

A That is my understanding, yes sir.

Q At the end of any trip in one day, if you decided you didn't want to fish any more, you could tie the boat up; couldn't you?

A I could stop. I could quit myself but I wouldn't altogether have to tie the boat up. They could find another man right aboard to go fishing.

[8] Q I believe you said that sometime you would take a leave during the season and put the mate in charge. Is that right?

A Yes sir.

Q Do you have to let the company know first or do you just go off and put this man in charge?

A Well, you may tell them that you are going to take off a week and go home and the mate will take the boat over until you come back.

Q You usually let the company know you are going to do that?

A Yes sir, if you are on a particular job, why, you can't take off any time.

Q In other words you let them know you weren't quitting the boat?

A That's right, yes sir.

Q And they usually said that was all right?

A Yes sir.

Q And I believe Mr. Waters asked you if the company would tell you when the fishing was going to start in a particular place like Cameron, and that's when you would go down?

A Yes sir.

Q If you went down at any other time, when there were no fish, the company didn't pay the living expenses; did they?

A Well, no sir, if I went on my own, I'd have to look out for myself.

Q So they would call you down when there was fish in the water?

A Yes sir. Now you take it now we are just standing by just waiting for orders to leave now. I am fishing out of Empire now. The plant is supposed to open up the 10th but they may not open the 10th because [9] they have planes looking for the fish and whenever they see enough fish to justify going down there, they will give us a call. We have our crew already engaged and we will take off after we get the transportation money.

Q You are not being paid now?

A No sir.

Q You don't get any salary or pay while you are traveling from here to Cameron either, do you?

A No sir.

Q It is only after you get on the boat and catch fish?

A Yes sir.
Q That's the first time you get your pay?
A Yes sir, that's right because we are on shares.

(COUNSEL AGREED TO WAIVE SIGNATURE OF WITNESS)

[10] NORTH CAROLINA
EDGECOMBE COUNTY

I, MILDRED DAVIS MAYNARD, being a Notary Public for the State of North Carolina do hereby certify that I sat in the office of Wallace Fisheries Company, 704 Arendell Street, Morehead City, North Carolina, at 10:50 A.M. on the morning of April 3, 1967, in the above entitled cause and the questions and answers recorded above were recorded by me and reduced to typewriting.

I further certify that I am neither counsel nor solicitor to either of the parties and that I am in no way interested in the result of this action.

Witness my hand and official seal this 28th day of April, 1967.

(Signed) MILDRED DAVIS MAYNARD
Notary Public

My Commission expires:
November 12, 1967

(SEAL)

TESTIMONY OF JACK THOMAS STYRON

Filed: May 29, 1967

[1] IN THE UNITED STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION

W. M. WEBB, INCORPORATED,
1221 North Broad Street
New Orleans 19, Louisiana
CARTIERET, INCORPORATED,
1221 North Broad Street
New Orleans 19, Louisiana
C. P. DEY, INCORPORATED,
1221 North Broad Street,
New Orleans, Louisiana,
Plaintiffs

versus CIVIL ACTION No. 15170
Section "E"

UNITED STATES OF AMERICA,
Defendant

LOUISIANA BUNKERS, INC.
a corporation,
1221 North Broad Street
New Orleans 19, Louisiana
PLAQUEMINES BUNKERS, INC.
a corporation,
1221 North Broad Street
New Orleans, Louisiana

CHARLES S. WALLACE III, INC.
a corporation,
1221 North Broad Street
New Orleans 19, Louisiana

Plaintiffs,

versus CIVIL ACTION No. 15171
Section "E"

UNITED STATES OF AMERICA,

Defendant

[2] SANTOS MENHADEN CORPORATION
Patterson, Louisiana,
CITATION, INCORPORATED,
Post Office Box 98
Patterson, Louisiana,
NOVELTY, INCORPORATED,
Patterson, Louisiana

Plaintiffs

versus CIVIL ACTION No. 15172
Section "E"

THE UNITED STATES OF AMERICA

Defendant.

PATTERSON MENHADEN, INCORPORATED,
1221 North Broad Street
New Orleans, Louisiana,
AGGIE & MILLIE, INCORPORATED,
1221 North Broad Street
New Orleans, Louisiana,

Plaintiffs,

versus CIVIL ACTION No. 15215
Section "E"

THE UNITED STATES OF AMERICA,

Defendant.

[3] G. B. L., INCORPORATED,
1221 North Broad Street,
New Orleans, Louisiana
MERLIN, INCORPORATED,
1221 North Broad Street,
New Orleans, Louisiana
FRANCES LOUISE WEBB and PATRICIA ANN WEBB, t/a WEBB-BUNKER COMPANY,
1221 North Broad Street
New Orleans, Louisiana

Plaintiffs,

versus CIVIL ACTION No. 15216
Section "E"

THE UNITED STATES OF AMERICA,
Defendant.

Proceedings had in Open Court on May 17, 1967. The HONORABLE FRED J. CASSIBRY, Judge, presiding.

APPEARANCES:

Joseph J. Lyman, Esq.
1200 18th Street N. W.
Washington, D. C.
Counsel for Plaintiffs

Robert L. Waters, Esq.
Tax Division, Department of Justice
418 United States Court House
Fort Worth, Texas
Counsel for Defendant

[4] BY MR. LYMAN:

If the Court please, the purpose of our session today is to wind up the evidence to be presented in this case which is mostly in the form of depositions. We would waive any opening statements and ask the Court to consider the Pre-Trial Order, which is rather elaborate,

as our opening statement. We do have one joint motion. Counsel moves the Court to strike the following from the Pre-trial order: Paragraphs 78 & 82 on page 17 of the Pre-trial order.

BY MR. WATERS:

The Defendant joins in the request, Your Honor.

BY THE COURT:

That is to strike what numbers, again?

BY MR. LYMAN:

Numbers 78 & 82.

BY THE COURT:

That is in the stipulation?

BY MR. LYMAN:

Yes, Your Honor.

BY THE COURT:

The Motion will be granted and I will physically strike it here in the Pre-trial order. That was numbers 78 & 82.

[5] BY MR. LYMAN:

Yes, sir. Your Honor, we have one witness, Mr. Jack Styron.

JACK THOMAS STYRON,

called on behalf of the Plaintiff, after first being duly sworn, testified as follows:

BY MR. LYMAN:

Q Would you state your full name, please?

A Jack Thomas Styron.

Q Where do you live, Mr. Styron?

A 5350 St. Bernard Avenue.

Q What is your present occupation?

A Executive for a business at 1221 North Broad.

Q Now, taking you back to 1956, what was your occupation at that time?

A Basically the same.

Q What company was that?

A It was with the Wallace Menhaden Products.

Q Now, in 1956, did the fourteen Plaintiffs who are listed in the captions of this case, did you have some relationship with them? There were thirteen corporations and one partnership. Did, in general, you have some relationship with them?

A Yes, sir.

Q Generally, what was the relationship as to some and [6] as to the others?

A Well, in some cases I was an officer of the corporation and in others I represented them on an agency basis. I believe that this group, all of them, had corporate entities with the exception of the one, that partnership. Now, in the case of some of the corporations that I was not an officer in I did represent them under an agency arrangement.

Q Now, under that arrangement, did you have occasion to have contact with the captains of the boats which were the assets of these corporations?

A Yes, sir.

Q And, what was your contact with these captains generally?

A Well, when I make reference to we, I am referring to the owner of the vessels in particular. As it pertains to the captains, I would be negotiating with them for a fishing season.

Q Well now, you personally engaged these negotiations with the captains involved here?

A Yes, sir.

Q And this is in 1956?

A Yes, sir.

Q And, where did this take place?

[7] A Well, back in '56 in North Carolina, Morehead City and Beaufort, North Carolina.

Q In entering into these arrangements, would your dealings be totally with the captains or also with the members of the crew?

A Only with the captains.

Q Were these arrangements oral or written?

A In '56, they were oral.

Q Now, in essence, this oral contractural arrangement that you had, what was the arrangement particularly with the captains' principal functions?

A The normal procedure and the best I can recall would go along these lines. At the end of a fishing season and before the beginning of another season, contacts would be made either by approaching the captain or by the captain approaching us or to me, directly, regarding fishing the vessel for the next season. And, at no specified time, but sometimes almost immediately after the close of the season and sometimes as late as just before the opening of another season we would get together and negotiate an agreement whereby the captain would take over the duties which are normally assumed by the captain in the industry, in the menhaden fishing industry which [8] is to take our piece of equipment and man it with a crew and operate it and direct the fishing operation and bring the fish into the designated point where they would be unloaded.

Q Now, when the fish were caught and brought back

by the captain to a designated point, how was his pay determined, right at that juncture?

A Well, the fish were unloaded from the vessel by a shore crew and they were measured by what we call a fish measuring machine which is actually a volumetric measure and each unit was constituted as a paying unit of one thousand. Really, it would be about 660 pounds of fish. And, a tally sheet would be given to some member of the crew, some designated member of the crew or to the captain recording that he had unloaded a given number of units for that day's operation. And that would be the determining factor as to how much the captain would be paid.

Q And, had there been a prior agreement as to how many dollars he would be paid per unit?

A Oh, yes. When we negotiate for the captain to operate the boat, that is one of the particulars that you have to consider, how many dollars you are going to pay him for the catch. Normally, the [9] amount agreed upon would be for the entire season. It is not an unknown figure, although, due to competition today you may have to change that amount. But if you did, there would be another negotiating agreement between the captain and the owner.

Q Was he paid by some measure like 1000 fish, is that a fair statement?

A Right.

Q And, how many dollars would he be paid for 1000 fish in 1956, if you have any recollection?

A Well, inflation has taken over now but as best I can recall it would probably be in the range of $2.00, maybe $2.20 a thousand.

Q And then, who would determine how the men or the crew are to be paid?

A The captain. He would set the rates of the various crewmen.

Q Now, after the fish were delivered to the plant, and that was for the purpose of making fish meal, am I correct?

A Right.

Q Did the captain have anything further to do with the fish?

A None, whatsoever.

[10] Q After that, it was between whom?

A Then the fish were the property of the plant which had a working arrangement with the boat owner under an arrangement where they processed the fish and paid the boat owner for the fish.

Q But the captain had no part in that subsequent arrangement?

A None, whatsoever.

Q Now, you indicated that you negotiated with the captains each season. Would you designate what a season is?

A Well, there are seasons in the Gulf that usually start . . . I am talking about the Gulf of Mexico . . . that usually starts around April 1 and terminates, usually, around October 15. Then, there is another season, there is a fall season, also, which starts around the latter part of October or the first or the middle of November and runs up to as late as January 15, off the Carolina Coast.

Q Was your arrangement with respect to each season separate and distinct or did one carry into the other?

A Oh, yes, definitely so. In fact, there were many, many times when the captain would be more suitable for [11] a Gulf operation and another captain would be more suitable, in the opinion of the owner, for a Carolina operation and it was not uncommon for one captain to fish a season in the Gulf and that vessel would then be transferred or turned over to a new captain that operated out of Carolina.

Q When you said definitely so, you meant what, that there was a separate negotiation or was not?

A That definitely was a separate negotiation.

Q Now, were separate records kept of each season or were they continuous records?

A There was separate records kept for each season.

Q Would you open and close for that particular season, is that correct?

A That's right.

BY MR. LYMAN:

Would Your Honor indulge me a moment? I think we can close this up shortly.

Q Now Mr. Styron, from your experience with the captains and with your experience in the menhaden fishing business, can you give us a statement as to what are the realities as to the owner's interfering with the captain as to where he should fish? By that I mean, once the Gulf area is decided upon, what would be the realities if an [12] owner told a captain to go to a certain place and no place else?

A Well, the best way I could answer that, there is no such as that. It isn't done in the menhaden business. That is, where the captain fishes other than the fact that he is in the Gulf of Mexico, that is the only re-

striction he has. He is cautioned to not go into restricted areas, say, Lake Borgne, which is a restricted area and if he is a new captain he would not be aware and the owner would be certain that he is informed so he would not be violating any fishing regulations.

Q That would result in some fine, perhaps?

A Definitely, sir.

Q But, do you have any view, backed by experience, as to what would really happen if an owner was interfering to that extent with a captain, if you have such experience?

A I do not have but I am certain it would be a definite reflection on the ability of the captain to properly direct the operations if this did happen and there would be serious repercussions in the crew. The owner may have the best guy in the world but he may not be in the eyes of [13] the men. The crew members are working for a captain. He is relying on that captain for his livelihood and he would not be satisfied with the judgment of an owner telling him where to go to catch his fish.

Q Let me ask you, Mr. Styron, in all the years that you have been associated with the industry, have you ever known of an owner telling the captain to fish in a certain place?

A Never.

Q Let me ask you one more thing, what do you think would be the realities in the relationship, what would happen to the boat in its operation if an owner insisted that a captain take certain men on his crew?

A Well, it just is not done. In the first place, the owner is not qualified to know what men should be the best men on the vessel. And, the captain has to main-

tain a very rigid control over the men who are on the vessel and I can foresee if an owner were to place crew members in the crew of a vessel that they would have a feeling of responsibility to the owner, direct, rather than to the captain, and the captain would have difficulty [14] getting his orders executed, which, when you go to sea, sometimes the conditions are such that it is the judgment of the captain as to what is to be done.

Q Let me ask you this, Mr. Styron, in all of your experience since you have been with the menhaden people, has an owner ever attempted to require a captain to take a certain man on his crew?

A Never.

Q Now, it is a fact, I believe you have testified . . . you did testify, did you not, Mr. Styron, persuant to notice on a deposition for the Government on August 24, 1966?

A Yes, sir.

Q And, I believe it was testified that these captains many times, following one season after fishing on one boat, would go to another boat in the fleet, that is a correct statement?

A Yes, sir.

Q Now, are there occasions when the captain may leave the fleet after one season or two seasons and go to a competitor?

A Yes, that happens quite frequently.

Q What is the cause of that?

A Well, that's just like any competitive business. If [15] he can go into and negotiate a better arrangement with some other owner, he would. He is free to do it. Generally, generally it does not occur except at the

end of the season. But, we have had instances where a captain would take a crew off of a vessel and man another vessel of a competitor right in the middle of the season. But, that is an unusual happening.

Q Is it a fair statement to say that increases in the amount of money per 1000 fish would cause a captain to take a competitive vessel?

A Oh, yes.

Q Do you ever bid to try to get the captain back?

A Well, we are in there fighting. We try to man our vessels. We try to use good judgment as to how much we can pay for these fish to the captain.

Q Now, primarily as an owner or a representative of an owner, what were you looking for as a result of this operation that the captain undertook on your behalf?

A We were looking for him to deliver the greatest quantity of fish to the designated point during the operating season.

Q Were you concerned, or did you interfere in any way [16] in the manner or the method in which he accomplished his fishing?

A No, sir.

Q There was testimony that in 1956 a crew usually consisted of about 24 to 26 men. How did that number come about?

A Well, if a normal operation in 1956, that was about the best sized crew to accomplish the most efficient operation.

Q Suppose there were too few men, suppose there would be only 15, what would happen?

A In 1956 it would have been impossible to have gotten the net back after they put it out.

Q Do these captains have any discretion as to whether they would take more men than 24 or 26?

A Oh, yes. In 1956 it was not uncommon that a captain would carry 26 men and even as high as 28.

Q Did the crew have anything to say about whether additional men came aboard?

A Yes. It was the captain's perrogative to decide how many men constituted the crew. But, I am sure that this reduced the amount of money that was paid to each individual as they were on a share and share basis and I would not be a bit surprised if at times the crew told the captain that we [17] should not have so many men or that they may have even insisted that he have more men. But, the captain was the man who determined the number of men that he would employ in the crew.

Q Going back to 1956, Mr. Styron, and keeping that in mind, I want to read the question and answer from one of the captains, witnesses, Mr. Oglesby, at page 5 of his deposition he was asked this question and he gave this answer: Q. Did the company put out a pay sheet indicating how much the Mates would be paid, how much the engineers, etc. would be paid? A. Yes, sir. Now, is that a correct statement for 1956, Mr. Styron?

A The best I can recall, there was no written statement put out by any owner to a captain stating the rate that would be paid any particular category.

Q How was it done in '56?

A Here again, it is a part of your negotiation between the owner and the captain.

Q Now, just right there, was that orally done?

A Oh, yes.

Q There was no written statement?

A The best I can recall, there was no written statement [18] at that time.

Q Now, this characterization of a pay sheet, was there some sort of sheet in later years?

A Yes, sir.

Q This testimony would refer to what years, if you have an opinion?

A I'd say '59, '60 onto the present time. I may add, if I may add, I am speaking for these units that we are having in question here. It is not uncommon today in the menhaden industry that they not have any written pay sheets.

Q We are trying to confine this to 1956 as we have a record to maintain. Just what is your statement as to whether or not there was a written so called, pay sheet in 1956?

A The best I can recall, there was not.

Q Now, on the deposition of Captain Dudley, page 5, there was a question: Q. But, did the company decide what size crew you were supposed to carry? A. That's right. Now, was that a correct statement of the working relation, as you understand it?

A No, sir.

Q What is the relationship?

A The relationship, in 1956 was a basic arrangement of so many thousand, so many dollars per thousand.

[19] Q No, you are not responsive. What I meant was, by my question, who would determine the size of the crew?

A Oh, the captain, in every instance.

Q Now, there is another question and answer by

Mr. Dudley, also, on page 5 and I will ask you a few things concerning it. Q. Did you know about the bonus before the season began? A. Yes, sir, that came right out on the pay sheet. I want to ask you. now, in '56, there was no pay sheet, is that correct?

A That is correct.

Q Therefore, if there was a bonus, certainly it would not have been published, is that correct?

A That's correct.

Q Now, was there a bonus in '56, do you recall?

A The best I can recall, there is a possibility that there could have been a bonus but the best I recall, I do not know if there was one. I cannot say if there was one.

Q Assuming that there was a bonus, what sort of arrangement was there, what does that bonus thing mean in the menhaden industry?

A Well, in an effort to keep the least amount of turnover in the crew, less shifting from boat to [20] boat, this bonus arrangement was, came into being, to pay those crew members that made the complete season, started it and stayed until the end of the season and this bonus was made strictly for that purpose.

Q Was there an element of incentive involved?

A Oh, definitely so.

Q How did incentive come into it?

A Well, it isn't so much an incentive . . . well, the best way to answer that would be that it is an incentive because each man is paid according to the number of units he helped to catch and part of his arrangement was that he had to stay in the crew and continue the operation on that vessel until the end of the fishing season.

Q And that was an arrangement between him and the captain?

A That is correct.

Q All right, sir. Now, Mr. Styron, in the course of your deposition on August 24, 1966, at page 87 you made a reference to captains who were re-employed using the word re-employed, would you explain in what context did you use the term or characterization, re-employ?

[21] A Well, in the sense that at the end of every season or before the beginning of another season, we renegotiated with the captains.

BY MR. LYMAN:

Your Honor, I believe that's all that fits into the deposition and if I went further we would be repeating ourselves.

BY MR. WATERS:

Q Mr. Styron, is the menhaden industry a rather small industry, so to speak, as far as the number of people involved in it?

A By comparison with the farming industry, the steel mills mining industry, yes, it is. There must be 6000 people involved.

Q Would you say, at any rate, that it is small enough that you were personally aware of most of the people in the menhaden business?

A Oh, yes.

Q We have a number of separate plaintiffs involved in these five cases which are consolidated for the purpose of this hearing, all of which I am sure you are familiar with. Is it basically true that there was a family relationship running through most of these corporatons that are involved in those cases?

Is Mr. George [22] Wallace involved to some greater or lesser extent in most of these companies?

A Yes.

Q Has Mr. Wallace and his family been involved in the menhaden business for some number of years?

A Since 1899.

Q Is this, too, more or less typical in the menhaden industry, has it been kind of a family involvement?

A Mr. Waters, to get to . . . I am just making, giving an opinion but there are entities that are not family connections in the industry.

Q Would it be a fair statement to say that there are at least several families known to have been rather large in the menhaden industry for several generations?

A I presume the question you are directing is not particularly to '56, but at anytime.

Q Well yes, historically, in the industry.

A Yes, and we have now one of the largest offshore drilling companies in the world in the menhaden business today, Zapato Offshore Drilling. There is no family connection there but your question, basically, I have to answer it yes.

Q The menhaden is not an edible fish, is it?

[23] A That's correct.

Q Is it manufactured into meal and oil?

A Fish meal, fish oil and fish solubles. Now, let me make or explain further the question and answer about edible. It is not being eaten now, but during World War II it was canned as silver sardine and sent to our good friends, the Russians. We did not do it,

our people did not, but normally it is not classified as an edible fish.

Q It is not marketed as an edible fish in this country, at any rate?

A That is correct.

Q These three products, the meal, soluble and the oil are marketed for raw material for other manufactured products?

A That's correct.

Q Would you describe to the Court, Mr. Styron, how this process goes about, from the catching of the fish to the manufacture of the products that are sold by menhaden industry?

A Now, I could speak for a good time.

Q Well, I don't care that you are quite that expansive.

A But, it is a process, basically, the fish are taken, there is a certain amount, they have to pre- [24] serve, a certain amount preservative, they can't be left to spoil. In fact, presently the F.D.A. is almost enforcing the same regulations as far as cleanliness in the menhaden plant and the sanitary conditions as they do in the sardine and herring canning factories. But basically, the fish are taken and cooked with steam and they are pressed in a continuous screw type press where they are reduced some 55% in pressed cake at that point. The water and oil is further processed by centrifuging, separating the oil from the water and then the water is further concentrated in evaporation, steam evaporation to a consistency of 50% solids and the press cake divides from the water in the process and goes into dryers where they are dried into a fish meal, which is a high protein product for poultry.

Q Are these fish meal plants, what I will refer to fish meal plants, located right on the coastline? Are they directly accessible to the catch boats?

A Yes, sir.

Q And, do the boats bring the catch right from the catch grounds, from the fishing grounds to the fish meal plant?

[25] A Well, I don't want to be too exact. I am not trying to tell you that it is not uncommon that they catch the fish and bring them immediately right in. That might be and it might not be. They might go to another area and fish before they bring it in or they might go to another area and not catch any fish but still bring them in. In the end, the catch is brought into the plant and it is unloaded.

Q At any rate, the boat, after the fishing trip, is directed to come directly back to the fish meal plant to unload?

A That's correct.

Q The catch is unloaded there directly by mechanical means and this manufacturing process that you have described is undertaken at the fish meal plant?

A Right.

Q For the final product, meaning the meal, the soluble, the oil and it is sold directly from this manufacturing plant?

A Right.

Q Has Mr. Wallace been involved to some greater or lesser degree of ownership of several of these fish meal plants?

[26] A Yes, sir.

Q What are the names of those plants or where are they located?

A Let me clear the point of ownership. Mr. Wallace, himself, does not own the controlling interest in any of these menhaden plants. But the ones in question, back in 1956 was the Wallace Fisheries Company, at Morehead City, North Carolina; Mayport Fishery Company at Fernandina Beach, Florida; the Empire Menhaden Company at Empire, Louisiana and the Louisiana Menhaden Company at Cameron, Louisiana.

Q Now, is it traditional with the industry that particular fleets of menhaden boats will operate out of particular processing plants?

A May I ask you if you mean by that question whether or not they would be where the places were in season, open.

Q In season, open.

A In season, open, it is, that is correct.

Q And, does this mean that as far as a particular group of 4, 6, 8 or 12, however many boats comprised the fleet, the fleet will be provisioned at or about the plants and fish in the area reasonably accessible to that plant and will return [27] to that plant to unload their catch?

A Yes, sir.

Q Now the boats, with respect to any given plant, isn't it a fact, in a particular season, of course, during a particular season, will fish out of that plant, they may or may not be owned by the same people that own the plant, is that true?

A That is correct.

Q And, you have some instances in which there will be some boats completely independent of that ownership?

A Yes, sir.

Q And, you have some other instances where a particular boat maybe partly owned by some of the same interests that own the processing plant?

A Yes, sir.

Q Would you have other instances in which the boats in the fleet maybe wholly owned by some certain interests that own part of the processing plant?

A Yes, sir.

Q Mr. Styron, insofar as the selection of a captain is concerned, isn't it true that most of these men, before they get to be a captain on a vessel, [28] have a number of years experience fishing for menhaden?

A Yes, sir.

Q This might run anywhere from 5 to 25 years of experience?

A Yes, sir.

Q This is sort of a specialized type fishing, isn't it? I mean, it's not just any stranger who has some acquaintance with the sea that could come out and do an adequate job?

A Are you making the question on a comparative basis with other fisheries? It is no more a specialty than it is to be a shrimp boat operator or a trawl operator as far as I know. In fact, sometimes there would be less qualified than one capable of taking a trawler to Campeche or off the Grand Banks.

Q For instance, to compare it to a shrimping operation, a man who is a good shrimp boat captain would not find it, let us say, real easy to switch right over to become a captain in a menhaden boat?

A Well I have known of cases where they have started off on shrimp boats, as shrimp boat captains and ended up in the menhaden business and vice versa.

[29] And, they leave the menhaden business and go into the shrimping operation.

Q When you make an arrangement on a seasonal basis with a captain, I suppose you place some reliance on what reputation he has within the industry as a boat captain?

A Yes, sir.

Q Would this reputation, it would involve, I suppose, how well he is able to get and keep a crew and how well he is able to perform in catching fish?

A That's correct.

Q Now, these people live pretty close on these boats, don't they?

A I don't get the question.

Q These captains and crews are forced together in close proximity in their fishing operation, aren't they?

A Oh, yes. They do have, they do maintain separate quarters, though. The captain has his quarters and the rest are separate from him.

Q At any rate, the nature of the undertaking is such that the captain will perform better if he has a crew with whom he can get along, and hold, isn't that correct?

A Well, I just feel that your statement is correct.

[30] Q Well, isn't this one of the reasons that the company does not interfere with the captain's selection because the captain is the one who has to live with the crew and operate with them?

A Well, yes, to the extent, in my opinion, the greatest area of concern would be that the man cannot serve two bosses and especially when he is in direct contact in having to take orders from one man and

then being responsible to another. It just does not work.

Q Now, when you said that either at the end of a particular season or during the off season you negotiate with a particular captain to fish a particular boat for the coming season, that it was understood by you and by him, also, that he was going to furnish a crew?

A Oh, yes.

Q I mean, you were not just hiring a captain . . . strike that word . . . you were just not negotiating for a captain but for a captain and a crew, weren't you?

A That is a difficult question . . . I can't . . . I can't answer that other than I knew that the negotiations were with the captain. The captain's commitment [31] to us was actually to man the vessel. He had other commitments to us, too. He could not be a renegade, a bum, he could not go uptown shooting up the place. He had to be of a character of credit to the owner. But, he was, it was his responsibility to man the vessel, to hire the men. It was his responsibility to set the rate of pay, to determine when they would go fishing and how long they stayed and when they would come back. In other words, to man the vessel and to operate the vessel.

Q And so, by having been in the industry, both you and these people that you were negotiating with, it was understood when you negotiated with a captain that the captain was going to have to furnish a crew and you would leave it up to his selection to man the vessel?

A Oh, definitely.

BY THE COURT:

Q Let me ask something here. Who made up the pay roll for the men on the ship?

A In 1956 the procedure was for the captain to turn in a list of his crew members and the catch that they participated in and the rate of pay and this was done. It was not turned in daily, [32] but it was kept on a daily basis and any change in the rate of a man would be reflected on a day by day basis. There was other information that the captain would turn in. He would turn in whether the man was present for the whole pay roll period and participated for the full time or whether he was there for just 10 days instead of 14 days and with this information a clerk prepared the pay roll.

BY THE COURT:

Is this all covered in the deposition?

BY MR. WATERS:

Your Honor, I propose to go into it to some extent.

BY THE COURT:

All right, proceed.

BY MR. WATERS:

Q Going back just a moment for a few more questions on this business of the selection of a captain, the areas within which the menhaden operation is pursued as far as fishermen are concerned, it's fairly defined, isn't that correct?

A Oh, yes.

Q I mean, you have certain places in the Atlantic that are traditional fishing grounds and certain [33] points in the Gulf that are traditional fishing grounds?

A Oh, yes.

Q It is understood, I suppose, anticipated, at least, by you and by the owners in negotiating with the captains that their experience is such that they know these places?

A Yes, sir.

Q Has the company or the several companies employed some means of assisting the captains in determining on a day to day basis where the best place is to fish?

A I guess you are making reference to the spotting operation.

Q Yes. Would you describe the spotting operation for the Court?

A Well, this is a service that is furnished by the plant to the boats, that we have a contract with to tell them where the fish are. And, this fish spotting service is there for the men if they want it. If they don't they don't have to take it. These spotters locate these schools of fish and by radio they communicate to the fleet. Most all of them are on the same frequency and they assist the captains in locating these fish. [34] Q Is there any charge made by the fish meal plant to the fleet for performing this service?

A No, sir.

Q This question of compensation, I believe you testified on direct examination, prior to the start of the season there was a price made known to the captain that this is the number of dollars and cents per thousand count of fish that you are going to pay for this season, is that correct?

A That is correct.

Q And, except for meeting the exigencies of competition later in the year, this would remain constant?

A That's correct.

Q This would not rise or fall with the market price that the plant is getting for its finished product?

A Not any whatsoever.

Q So long as the captain and the crew caught fish they got paid this rate?

A That's correct.

Q Now, the mechanics of how this compensation worked, there were some member of the crew, either the captain or a person designated by the captain who is responsible for keeping a count on a day to day basis of what the catch was and what crew members participated in the catch, isn't that [35] correct?

A Yes, sir.

Q Now, when one of these boats unloaded at the plant there was someone there at the dumping operation who made out a ticket on his catch, isn't that true?

A That's true.

Q And this ticket was delivered to this person in the crew who kept tab?

A Yes, sir.

Q And this showed what the catch was on each trip that it came in an unloaded?

A Yes, sir.

Q And if a particular crewman was absent for five days out of the fourteen day period, this ultimate talley turned in would show that he participated in X number measure being the thousand fish measure which were those fish caught on those 9 days that he did participate?

A That's correct.

BY MR. WATERS:

Your Honor, do we have the file of the case here in the Court . . . I mean the depositions. I would like to pull Mr. Styron's.

Q Mr. Styron, I hand you a document which has been marked [36] Defendant Exhibit #1 and I ask you is this is a typical type of information sheet turned in by the menhaden boat captain to the front office for the purpose of making up the pay roll?

A No, sir.

Q What is it?

A This is the summary that is prepared from the information that the captain turns in. He does not turn in this particular form.

Q You mean, he turns in this information but not in that particular form?

A Right.

Q Is there some clerk in the company's office that make up this particular form on the basis of the information turned in by the captain?

A Yes, sir.

Q I hand you a document marked Defendant Exhibit #2 and I ask you if you will identify what that is. please?

A This is what we call the individual pay roll record which is maintained on each and every individual. This is posted, the payments that maybe paid to the particular individual during this particular season. This form is prepared on a calender year basis. But, it maybe, if it were two [37] seasons, it maybe that there were two such prepared.

Q If it fell within two different calender years?

A No, if it fell within two seasons or if it would

split a calender year you could have another. This is what we call the individual pay roll record.

Q Is it correct that each one of the companies with which you were dealing maintain such a pay roll record with respect to each captain and crew member manning one of those vessels?

A Yes, sir.

BY MR. WATERS:

At this point, Your Honor, I offer into evidence the Defendant's Exhibits #1 & 2.

BY MR. LYMAN:

No objection.

BY THE COURT:

They will be admitted.

BY MR. WATERS:

Q This is the individual pay roll record?

A This is the summary sheet with the information turned in for the purposes of making up the pay roll.

Q Mr. Styron, how often are these crews, meaning the captain and the crew members paid?

[38] A Bi-weekly.

Q Every other week?

A Yes, sir.

Q Are they paid by check?

A Yes, sir.

Q Are these checks made payable to and delivered directly to the individual crew members?

A No, sir. They are delivered to the captain.

Q Are they made payable to the separate crew members, individually?

A Yes, sir.

Q And, those . . . it is the captain's responsibility

to see that they get into the hands of the crew members?

A Yes, sir.

Q Have you had instances or have instances come to your attention in these various companies where a captain's relationship with a boat or with a company was terminated?

A Yes, sir.

Q How do these terminations come about?

A The normal procedure is if the conditions warrent some action by the captain to decide that he is no longer, that he can no longer fulfill his end of the bargain, he just comes in and tells the [39] owner, I can no longer operate the vessel and here are the papers and I would like to have my name taken off that I signed as master. By the same arrangement, if, due to poor health or some . . . I cannot recall any particular misconduct in which the captain was relieved of his duty. But, if he does not produce, then it can be terminated.

Q Now basically, your arrangement with the captain is that if you negotiate prior to the season, so long as he performs satisfactorily to the owner, he can and he is going to fish that boat for that particular season, is that correct?

A That's correct.

Q This may be a leading question but if a crew, if his crew disintegrates on him and he simply can't perform his obligation . . .

A Surely.

Q And, you indicated, I believe, that a termination might result from the fact that he is not producing,

not producing an adequate catch from the company's point of view or the owner's point of view?

A Yes. But that is not a common occurrence. Every instance is a case of its own and has to be [40] considered on whether the weather was adverse or whether the man has had a good cause. There are a lot of factors that enter into it. But normally, a contract is made for a season and normally the original captain and his crew completes the season. There maybe a turn over in the crew, a considerable turn over in the crew. But normally the captain will continue throughout the season.

Q Mr. Styron, who, as between the boat owner and the captain and the crew are responsible for keeping the boat in working order?

A It is the captain's responsibility to see that the vessel is seaworthy. It is part of the negotiations with him. He has the authority to say that it is unseaworthy or seaworthy.

Q You mean insofar as determining whether a particular aspect of the boat, the equipment and so forth strikes him as being seaworthy or not, that is his decision?

A That is correct. That does not necessarily mean that everything he says is accepted as being gospel, the gospel truth and we would take corrective measures or not. But, it is part of the negotiation whereby we furnish him a seaworthy [41] vessel in accordance with his determination of seaworthiness. But, that is really never a factor.

Q If, at some stage of the operation during the season he determines that the vessel either is unseaworthy, seaworthy or not, in the maritime sense, it

is not suitable, something is wrong with it for the purpose of fishing, who bears the financial responsibility for putting it back in shape?

A The owner.

Q The boat owner does?

A Yes, sir.

Q Who bears the financial responsibility for such things as loss or severely damaged seins?

A The owner.

Q Approximately what is the cost of one of these seins?

A Back in 1956 probably eight to ten thousand dollars.

Q Mr. Styron, do the boat owners maintain some sort of insurance with respect to these vessels?

OBJECTION BY MR. LYMAN:

I want to object to that question. We are getting into an area now which has nothing to do with the working relationship between the owners and the captains. If the owners want to get insurance, they are just buying [42] peace of mind. That doesn't have anything to do with the captain unless it turns up that the captain is a party to this policy, which I do not believe he is. We are getting into an area now, I think counsel is boardering on trying to establish these employees for compensation purposes. This is not the case at all. We are trying to cover 1956 to the narrow issue of the common law which is defined by the old and ancient common law test.

BY MR. WATERS:

My cross-examination won't take very long on this, may I continue?

BY THE COURT:

Read the question back.

(The question was read back.)

BY THE COURT:

Mr. Lyman, I read your Pre-trial memorandum and I understand your position. However this is a Judge tried case and I think, since I do not know too much about it yet, I will hear it all and then I will consider your objection when I consider the case. I will decide at that time whether I think it's relevant or not. The objection is overruled and we will take this [43] subject to your objection.

A The business practice is to have a vessel insured, the hull insured and also to carry P. and I. coverage.

BY MR. WATERS:

Q This P. and I. coverage will that cover, from your understanding, any liability that might arise to the boat from a collision with another boat?

A Mr. Waters, you are getting into an area where there is a difference of opinion on, whether it covers or not. Normally, it would, but actually, if there is a contributory factor by the owner the coverage would not be applicable to the accident.

BY MR. LYMAN:

If Your Honor, please, I want to just object once more for one more reason. I understand what the Court has said. This is getting into a question of negligence and admiralty. We are simply getting a little far afield here. I just wanted to make that observation in connection with my original objection.

BY THE COURT:

All right, I will hear it, the objection is overruled.

BY MR. WATERS:

[44] Q Mr. Styron, have you had, or have these companies had, which you are here telling us about, have they had particular experience where an injury was had by a person or where property was involved by reason of the operation of one of these vessels which your insurance carrier, the carrier of your P. and I. insurance responded by making payment to the damaged parties?

A Yes, sir.

Q Have you had instances which members of the crew, meaning these vessels, have been injured or lost at sea?

A Yes. And, I may add that we have had charges brought against us where they were not lost at sea, they weren't even on the vessel, they would fall off of a truck somewhere.

Q You would mean in proceeding to their destination?

A In my opinion, no, they were not proceeding to the vessel. I don't mean to confuse the issue but it is real tight.

BY THE COURT:

I can see that this is probably irrelevant and immaterial to this issue.

BY MR. WATERS:

Q Have you had claims made against the boat or the boat [45] by or on behalf of these persons who were lost or injured?

A Yes, sir.

Q Have payments been made to those injured persons or those claiming on their behalf, by your insurance carrier?

A Yes, sir, above the deductible of the policy.

Q Have you had instances in which a crew member was injured, not completely disabled, but injured to the extent that he was away from the boat by reason of his injury for a period of a week or ten days or two weeks for some period of time, less than the season?

A Yes, sir.

Q Have the companies, or the boat owner or the insurance carriers responded by paying that crew member Maintenance and Cure during the period of time that he was off?

A Now, here again I am trying . . . I am recalling, reflecting back to 1956.

Q Yes, sir.

A It was not uncommon at that time that the crew member be continued on in the catch of fish and the captain pay him. It has only been in recent years that Maintenance and Cure has become a [46] factor in this operation of these menhaden vessels and the best I can recall, in 1956, it is questionable to me that there was any Maintenance and Cure, any claims filed in that category.

BY MR. WATERS:

I have no further questions, Your Honor.

BY MR. LYMAN:

Your Honor, just a few questions, if I may?

Q Mr. Styron, I believe you used the term, under questioning by counsel, that a captain was terminated if he didn't produce menhaden for a season, do you recall making that statement?

A Yes, sir.

Q Now actually, what occurs is you do not renew

the relationship the following season, is that an accurate statement?

A Yes, sir.

Q I believe counsel asked you in this fashion, was it the captain's responsibility to see that the checks were delivered to the men. Do you recall that? I believe you said yes.

A Yes, sir.

Q Isn't it a fact that the captain tells your office how much each man is supposed to get?

[47] A Yes, sir.

Q And, the captain also tells you that he is to be given a check so that he can distribute the checks to the men and not the office, isn't that true?

A Yes, that is correct.

Q Under the arrangements, the office does all of the paper work, is that correct?

A Yes, sir.

Q But the captain tells you exactly how much each man is to get without interference by the company?

A Yes.

Q Now counsel asked if the men were paid every two weeks. I believe your answer was that they were. Isn't it a fact that the captain can or may draw his money at anytime?

A Yes, and it is not uncommon that they would have a catch and would not be paid every two weeks.

Q Well, assuming the normal situation, can he or does he many times draw money in the middle of the week that he had earned up to that point?

A Yes, he can, at times, in the middle of the week notify the office that Joe Blow is due so much money and the check is prepared for him.

Q What you are saying is that a man may also draw [48] during the week, a crewman, if the captain authorizes it?

A Yes, that is correct.

Q Now, about this pay roll record that counsel referred to this is Defendant's Exhibit #1, up there, Mr. Styron.

A I know what it is.

Q Does that have any reference to this pay sheet that Mr. Oglesby testified to that is issued? That is not the same thing, is it?

A No, sir.

Q Now, this is, Defendant's Exhibit #1, is a compilation of the captain's discussion with you concerning pay, is it not?

A Yes, sir.

Q Now, Exhibit #2, which is a record, that is a permanent part of your records in your organization, is it not?

A Yes, sir.

Q That is required by the Internal Revenue to be kept in that or some similar fashion, is that true?

A Yes, sir.

Q Now, in your negotiations with the captain, is it the understanding that he is the only one that is paid by the owner, is that correct?

[49] A Yes, sir.

Q The owner does not reach over his head and deal with any member of the crew?

A That is correct.

Q Now, about these spotting operations of these planes, are there situations where a captain does not

follow the recommendations of the pilot regarding any spotting of a school?

A Yes, sir.

Q And, under what circumstances would that happen?

A Well if in his opinion the information that the spotter gives him is not proper or correct and he feels that he can do better by using his information he may go in a different direction.

Q Does that not happen sometimes?

A Oh, yes.

Q Now counsel was asking you about the family relationship, particularly with respect to the boats in this fleet and the plant. Let me ask you this, sir: Are you related to Mr. Wallace?

A No, sir.

Q Are any of the captains, as far as you know, related to Mr. Wallace?

A No, sir.

[50] Q Now, there is testimony in the depositions of the captains and I believe in yours to the effect that there were power blocks or power machinery used in fishing. Was any such machinery used in 1956?

A No, sir.

Q So, any reference to power block machinery and reduction of men to 17 in number would not apply to 1956?

A Yes, sir.

Q Counsel asked you if it wasn't a fact that a boat fishes in an area where a plant is located from which the boat had originally sailed. Do you recall that?

A Yes, sir.

Q I believe your testimony was such that a captain would fish in that particular area. Was that so in 1956?

A Yes, sir.

Q And, what was the reason for that?

A Well, they have a time element. They had to return to the port with the catch before it spoiled and therefore they were limited by the distance to and from the plant.

Q It was the captain's interest to come back to the plant with a high grade of fish, as high a [51] grade as he could.

A Right.

Q I think counsel asked you if it was not the captain's part of the bargain to come with a crew ready to man the ship and I believe you testified that that was so. Do you recall that?

A Yes, sir.

Q Is it part of the understanding, the arrangement, that the captain must have a complete organization of proper officers like mates, engineers, pilots and so forth before he is permitted to take a vessel?

A Yes, sir.

Q And, who selects all of those people?

A The captain.

BY MR. LYMAN:

Your Honor, while Mr. Styron is still on the stand I would like to ask the Court . . . well, we move the Court to strike a statement made on page 85 and 86 of Mr. Styron's deposition for the reason that he was interrogated by Government's Counsel and he made a gratuitous statement relative to an area which, if gone into, may make a question of digression. At page 85

it is simply this: [52] Government's Counsel asked, at page 85, Mr. Styron's deposition, August 24, 1966, Government's Counsel asked Mr. Styron the question: Q What do the captains do in the off season? They have no relationship with the owners at all in the off season? A They live a life of leisure, draw their unemployment. That is a crime, too. I am very much against that. In 6 months these men are going to make $20,000 or $18,000 and they go down and they draw their unemployment during the 6 months because they are no captains' jobs in the menhaden fishing available to them.

Under the unemployment laws they have to pay them.

Now, Your Honor, rather than going into a defense of that we move that it be striken, if counsel has no objection.

BY MR. WATERS:

Your Honor knows that it is irrelevant to the line of questioning and I have no objection.

BY THE COURT:

All right, it will be striken.

BY MR. LYMAN:

I have no further questions of Mr. Styron, but, I have one in the nature of an objection.

[53] BY MR. WATERS:

I have one additional question of Mr. Styron, maybe two or three.

Q During the course of the season, Mr. Styron, does the price which the processing plant pays to the boat owner for fish vary?

A The normal procedure is an arrangement whereby a complete season is made and at the end of the

season a determination of the value of the fish is shared between the vessels delivering the fish and the plant on a percentage basis.

Q You mean to say that the price actually is not set until the season is over?

A The method for computing the price is set and it is an averaged procedure that has been in existence for 50 years. In other words, actually what this product brings on the market determines, after certain plant expenses are considered, it is divided between the boat owners in proportion to their particular boats' delivered to the plant during the season. So, in reality, it is one price set for the whole season but it is not determined until after the season is over with because the expenses are not gone into until that time and the value of the pro- [54] duced is not known. Now, there is a calculation, you know, made that they will anticipate that the fish will be worth a certain value during the coming season on a projected market basis and it is on that basis which the owner starts his operation. But, in reality, every fish that is delivered to a plant during the year, that boat owner is paid the exact amount of dollars for his fish.

Q In essence, in accordance with a formula worked out before the season, the boat owners and the processing plants ultimately divide the operation as of the end of the season.

A That's correct.

BY MR. WATERS:

No further questions.

BY MR. LYMAN:

Just one question.

Q The captain has no part in that last negotiation that you have just discussed?

A None, whatsoever.

BY MR. LYMAN:

No further questions.

BY THE COURT:

You may step down, sir.

[55] BY MR. LYMAN:

If the Court please, yesterday I filed two depositions that were taken on April 27, 1967. They were not intended to be evidence as a part of our case in chief but rather as a rebuttal, if it was necessary. Up to now I find that counsel has not raised the point that I had intended to rebut with these depositions, however. I ask the Court's permission to file them, anyway, in the event they are required in the brief as some phase of this may come out in the brief. Then, we would not be in a position to inform the Court of what our rebuttal in these depositions are. In this fashion they will be in the records. They are the depositions of officials of the Internal Revenue Service.

OBJECTION BY MR. WATERS:

I make the blanket objection that the depositions are irrelevant and immaterial. Of course, the Court cannot answer as to that question until after the briefs have been put in.

BY THE COURT:

I will admit them subject to the objection.—

BY MR. LYMAN:

[56] Very well. They have been filed with the clerk.

BY MR. WATERS:

I think you ought to specify the names of the deponents.

BY MR. LYMAN:

The first deposition taken on April 27, 1967. it is the deposition of three persons, Ruby Morris, Fred J. Herzog, Coulter Sabathier. Further, there was also a deposition on April 27, of Calvin G. Shaw.

BY MR. LYMAN:

The Plaintiff has nothing further.

BY MR. WATERS:

On behalf of the Defendant I would like to offer seven depositions, these are in the Court's files. Rather than read them now I would appreciate it if the Court would just have them available for consideration. The deponents names are, Harry Thomas Willis, William Gladston Oglesby, James S. Fullwood, Horrie Olden Johnson, Larney Arling Johnson, Alexander Dudley.

I would like to offer, also, in the early stages of this case, there were propounded by the Defendant to the Plaintiffs certain interrogatories [57] and answers which were made in due course. There are a few of the questions and answers that I would also like to offer out of each set of interrogatories that are in each of the five cases. I would like specifically the questions and answers of the following numbers 1, 2, 3, 4, 5, 6, 10, 30 and 31. And also just for the purpose of completeness, Your Honor, since it is a good deal more expansive than the testimony this morning, I would like to offer the testimony of Mr. Jack Styron subject to the matter striken, since he is really an officer of the company, under Rule 16. I have nothing further.

BY MR. LYMAN:

I object to the introduction of the interrogatories insofar as they do not fit in with our very elaborate stip-

ulation and on the grounds that they are irrelevant and immaterial.

BY THE COURT:

All right, I will admit them subject to the objection. Is that all, gentlemen?

BY MR. WATERS:

That's all for the Defendant.

BY THE COURT:

[58] Then, the case will be submitted. How long do you want to take to submit briefs, proposed findings of fact, and conclusions of law?

BY MR. WATERS:

If I may, I suppose this is unusual for the Defendant to do this, but I would like to go ahead and do it pretty quickly. I would like to submit my brief and proposed findings of fact and conclusions by the 31st of May and let Mr. Lyman respond to that.

BY MR. LYMAN:

I would need at least until the 15th of June.

BY THE COURT:

So ordered.

CERTIFICATE

I certify the foregoing pages contain a true and correct transcript of the proceedings had in Open Court on May 17, 1967, to the best of my ability and understanding.

(Signed) JOSEPH H. ECHEZABAL
Joseph H. Echezabal
Official Court Reporter.

FINDINGS OF FACT AND CONCLUSIONS OF LAW OF THE DISTRICT COURT

CASSIBRY, District Judge:

These five causes involving similar issues of law and fact were consolidated for trial before the Court sitting without a jury.

These are actions under the Internal Revenue laws of the United States for the recovery of taxes paid pursuant to the Federal Insurance Contributions Act, 26 U.S.C.A. §§3100 et seq., and the Federal Unemployment Tax Act, 26 U.S.C.A. §§3300 et seq., for the period commencing January 1, 1956 through December 31, 1956, for all plaintiffs with the exception of the plaintiff Aggie & Millie, Inc., in Civil Action No. 15215. The suit for

taxes paid in the latter suit covered the period from July 1, 1957 through December 1, 1958.

The issue to be determined is whether the fishermen, comprised of captains and crewmen, who performed fishing services on the plaintiffs' boats were "employees" of the plaintiffs under Sections 3121(d) and 3306(i), Internal Revenue Code; 26 U.S.C.A. §3121(d) and 3306(i).

Only that portion of Federal Insurance Contributions Act taxes (FICA), an excise tax, paid by the plaintiffs is sought to be refunded. No part of the fishermen's FICA taxes, an income tax, is sought in these actions. The Federal Unemployment Act taxes (FUTA), which are excise taxes, paid solely by the plaintiff are also sought to be refunded.

Due consideration having been given to the pleadings, stipulations and evidence, together with exhibits and briefs of counsel on file, the Court enters the following findings of fact and conclusions of law in accordance with Rule 52 of the Federal Rules of Civil Procedure:

FINDINGS OF FACT

1.

Each of the plaintiffs was a corporation, organized under the laws of the State of Louisiana, with the exception of the plaintiff partnership, Frances Louise

Webb and Patricia Ann Webb, t/a Webb-Bunker Company in Civil Action No. 15216.

2.

In Civil Action No. 15170, the plaintiff W. M. Webb, Inc. owned two menhaden boats. The plaintiff Carteret, Inc. owned one menhaden boat; Plaintiff C. P. Dey, Inc. owned one boat.

3.

In Civil Action No. 15171, the plaintiff Louisiana Bunkers, Inc. owned two menhaden boats. Plaintiffs Plaquemines Bunkers, Inc. and Charles S. Wallace III, Inc., each owned one menhaden boat.

4.

In Civil Action No. 15172, plaintiff Santos Menhaden Corp. owned five menhaden boats. Plaintiff Citation, Inc. owned two boats and plaintiff Novelty, Inc. owned one boat.

5.

In Civil Action No. 15215, plaintiff Patterson Menhaden Corporation owned two menhaden boats and plaintiff Aggie & Millie, Inc. owned one boat.

6.

In Civil Action No. 15216, plaintiff G. B. L., Inc. owned

two boats. The plaintiff Merlin, Inc., owned one boat. The partnership, Frances Louise Webb and Patricia Ann Webb, t/a Webb-Bunkers Co., owned one boat.

7.

During said period, each plaintiff was engaged in commercially fishing for menhaden, a non-edible fish. Their business activities embraced (a) the ownership of menhaden fishing boats, (b) the fishing for menhaden under arrangements with captains on the terms and conditions and pursuant to policies outlined in these Findings of Fact, and (c) the processing of menhaden into fish meal products for later sale on the open market.

8.

There were several separate and distinct steps in the fishing and subsequent processing of the fish before the end products were marketed. First, the plaintiff boat companies contracted with the captains to gather the fish. To this end, a plaintiff furnished a boat equipped for fishing. The owner relinquished control of the boat to the captain who staffed and provisioned it as he saw fit, without interference by the owner. In return, the captain agreed without a guarantee of earnings of any kind to make fishing trips for the season, return the catches to a plant designated by the owner and unload and sell his fish to the owner at an agreed price per catch. The owner would then contract with a processing plant for processing the fish purchased from the captain. The fish would be processed into fish

meal and related products and sold on the open market. The proceeds were then divided between the boat owner and the plant after crediting the venture with expenses and the cost of the fish. The captains had no part in the arrangements between the plant and the boat owner. All of the plaintiffs conducted their business in substantially the same manner.

9.

The plaintiffs' boats were diesel powered and from 85 feet to 150 feet in length. The cost of the boats varied from $24,000 to about $157,000 depending upon age and size.

10.

The plaintiffs' boats operated from docking facilities owned by fish meal processing plants, located in North Carolina and Florida on the eastern seaboard and in Louisiana on the Gulf of Mexico. During this period, the plaintiffs' boats operated from one or more processing plants located in the following ports: Wallace Fisheries Company, Morehead City, North Carolina; Mayport Fisheries Company, Fernandina Beach, Florida; Empire Menhaden Company, Empire, Louisiana; and Louisiana Menhaden Company at Cameron, Louisiana.

11.

Neither the plaintiff boat companies nor the fish meal processing plants had financial or proprietary

interests in one another. Individual stockholders of some plaintiff boat companies had a stockholder's interest in some of the plant companies, but not in others. On the other hand, some stockholders of the plant companies had no interest in the various plaintiff boat companies. All of the various entities, i.e., plaintiff boat companies and the plant companies, were separate and distinct operations with respect to business matters transacted among them. The individual stockholder interests in no way determined from which plants the various plaintiffs operated the boats or sold their catches of fish.

12.

The plaintiffs' boats were equipped by them and operated solely for menhaden fishing. All repairs to the boats were made by, and paid for by, the plaintiffs. After the plaintiffs had equipped a boat for fishing for menhaden, from the fishermen in the community making application therefor, plaintiffs would select an experienced fisherman to whom a boat would be turned over for the purpose of fishing in the Gulf of Mexico or off the Carolina and Florida coasts in the Atlantic Ocean. It was understood that the fisherman to whom a boat was let would be its captain and he was so recognized by the plaintiffs. An individual so selected was one in whose honesty and integrity plaintiffs had confidence and in whom plaintiffs had trust in his ability to select, supervise and organize a crew of officers and hands to operate a boat and to conduct successful fishing operations.

13.

The arrangement between the plaintiffs and each captain was entirely oral. The term of the arrangement was not specified, but it was understood to persist for a fishing season. It could be terminated by either party, voluntarily or involuntarily, at the conclusion of any trip during a season. This could occur only when a boat was in port and before another fishing trip was commenced. While the arrangement could be so terminated, custom and practice was for it to be continued for the season.

14.

After a plaintiff had selected a captain and the arrangements between them had been concluded, the boat was turned over to the captain who then registered as captain of such boat with the Bureau of Customs as required by federal law.

15.

While not formalized by the parties and designated as such, the arrangement between plaintiffs and the captains thus constituted an oral contract, pursuant to which the captains used the boats belonging to the plaintiffs to go out to fishing grounds, and by their own means and methods make catches of menhaden fish and return them to a designated processing plant for unloading and sale to the plaintiffs at an agreed price per unit of measurement. The plaintiff boat owners' interest in the arrangement was to obtain the larg-

est quantity of fish possible, delivered to a designated processing plant. The plaintiffs in no way interfered with the captains as to the manner or method of accomplishing their result.

16.

The fishing "season" in the menhaden fishing industry usually began in the Gulf of Mexico about April 1 and concluded about October 15. A fall season off the eastern coast of the Carolinas and Florida commenced about November 1 and concluded around January 15. There was also a summer fishing season at times on the Atlantic coast which usually began about May 15 and concluded about September 1.

17.

The general area for fishing a boat, i.e., the Gulf of Mexico or Atlantic Ocean, was usually the plaintiffs' decision. This was guided by the seasonal presence and availability of the menhaden fish. If a boat owner had an option of two places to fish, the captain's preference where to fish was a factor in a joint decision.

18.

Some captains fished only in the Gulf area by their own choice. Others fished only off the Carolina coast in the Atlantic Ocean. Some fished in both areas for consecutive seasons in a single year. Others fished a single season for plaintiffs and at other times for competitors. Some captains fished consecutive seasons on

some of plaintiffs' boats. Other captains contracted seasonally with various of the plaintiffs for use of their boats over a period of years. There was no pattern of continuity of relationship between particular captains and particular plaintiffs.

19.

There was nothing in the arrangements between plaintiffs and the captains which required plaintiffs to assure or guarantee any captain the use of a particular boat, or in fact any boat, beyond a single fishing season. Nor were captains bound to accept a boat offered by a particular plaintiff once a season ended. Thus, each season was the subject of new and separate negotiations between plaintiffs and the captains. Although a captain may have completed a season in the Gulf of Mexico and left the boat to take another, or sailed the same boat to the Carolina coast to fish the fall season, a new arrangement was made each season with the particular boat owner.

20.

The commencement and termination of a season was a separate and complete arrangement and was so considered by the plaintiffs and captains. All arrangements between them were understood to be on a season-to-season basis. A new and complete set of personnel and financial records were instituted for each boat for each new season and maintained by the processing plant from which the boat operated during the season. The opening of the processing plants deter-

mined the commencement date of a particular season. When the season commencement date is fixed, the taxpayers furnish their captains and crews, many of whom are required to travel from North Carolina to Louisiana, with transportation money.

21.

The plaintiffs during this period determined that a crew of 24 men was the number necessary for successful fishing. Each captain, however, determined the qualifications of, and selected, his crew which in this period consisted of a mate, engineer, pilot, cook and about 20 net handlers. The captain could in his discretion hire additional mates or engineers or net handlers, but seldom did because the additional cost would be deducted from his share of the catch. He also had the right to sail with less than 24 crewmen, but did not without consulting with the plaintiff.

22.

In negotiating for the service of a captain, it was understood that the captain would select the crew members. Prior to commencement of a new season, the taxpayers would furnish the captain with the pay scale of crew members and the crew size to be employed for the season. If a bonus was to be paid for fishing the entire season, this information also was furnished the captains.

23.

Although the taxpayers did furnish a pay scale and a statement regarding crew size to the captains, there was some flexibility left with the captains on these matters. If the captain desired to raise the pay of a particular crew member, he could do so by reducing his own level of compensation.

24.

Defendant contended and the plaintiff denied that the captain was required to pay a crew member not less than the scale established by the plaintiff. The testimony of the various captains leave no doubt that the plaintiff not only fixed the pay scale of the crew but also the number of crewmen to be hired.

25.

Each captain, to the exclusion of the plaintiffs, had full charge of his crew and determined (a) when to depart from port on a fishing trip; (b) when to return; (c) where to fish (that is, the fishing grounds to work); (d) when to fish; (e) how to fish (that is, the actual, mechanical process of putting out the nets, purse boats and other gear); and of all other matters concerning the operation, maintenance and fishing of the boat from the time of departure until it returned to unload the catch. All of the foregoing were the exclusive prerogatives of the captain. The crew took their orders from the captain exclusively.

26.

Plaintiffs had certain general policies made known to the captains which were a part of the arrangements between plaintiffs and each captain; for example, intoxicating liquors were not to be taken aboard the boats, and to refrain from fishing in areas restricted by law to avoid fines and other penalties imposed by the State.

27.

Plaintiffs had no right to, nor did they attempt to instruct a captain or crew as to their actual fishing activity, nor how to accomplish it.

28.

The captain was responsible for keeping the boat clean, the engines in working order and while the boat was in port to keep it properly moored, watched and pumped out. The captain received no additional pay for this work, other than the proceeds from the sale of his fish catches to the plaintiff boat owner.

29.

At the outset of each season, the plaintiffs and the captains who used their particular boats negotiated a price at which plaintiffs would purchase and the captains would sell their catches of fish, to be delivered and unloaded at a designated fish meal plant.

30.

Payment was made by the boat owners to the captains at an agreed rate per unit, i.e., each 1000-fish caught and delivered. The unit of measurement, a "1000-fish," was the volumetric content of an unloading device at the plant where the fish were unloaded. The measure of a 1000-fish weighed 660 pounds.

31.

There was no guarantee of compensation of any kind regardless of time or effort expended by the captain and crew. Unless a captain caught fish to sell to plaintiffs he had no earnings.

32.

The price paid by the plaintiffs per 1000-fish differed with the seasons and among plaintiffs in their separate negotiations with captains. However, the price usually remained constant during a particular season, irrespective of fluctuations in the marketability of the fish products processed.

33.

In addition to the price paid per 1000-fish unit, plaintiffs agreed to pay a captain an additional amount per unit as a "bonus." The bonus, small in relation to the price per unit of fish paid the captain, was in addition to the purchase price agreed upon. It was payable only at the conclusion of a fishing season. The amount sea-

sonally varied among the various plaintiffs and captains in accordance with the number of units of fish caught during the entire season. The bonus money thus paid the captain was distributed at the conclusion of a season among the crew in such amounts as the crewmen and captain negotiated, based on the number of units of fish the crewmen helped to catch. The plaintiffs had no right to interfere in the negotiations between captains and crewmen. The bonus served two purposes: First, it stood as a reward or an incentive for the crew to exert greater efforts to increase the size of fish catches, and second, it aided the captain to induce the crew members to remain with the vessel to the end of the season in order to realize the additional money.

34.

The plaintiffs did not know who the crew members would be at the time plaintiffs and the captain entered into their arrangements. Plaintiffs had no written record of the crewmen's identity until they filled out forms listing them on plaintiffs' records for state and federal tax requirements, or until the captain filed his first bi-weekly payroll record with the particular plant. Personnel turnover in crews varied among the boats. Factors determining turnover and relative stability among the crews depended largely upon the captain's ability as a fisherman. The plaintiffs reserved no right to interfere in these matters, nor attempted to do so.

35.

The captain decided how much fuel and groceries to take aboard. The fuel was usually obtained at fuel docks near the plant from which the boat operated or anywhere a captain decided. Fuel consumed was paid for by the plaintiffs. The captain had the right to purchase his groceries at a store of his own selection and either paid cash for them or charged them in the name of the boat and a bill therefor would be sent to the plaintiffs. At the time of settlement the amount charged against the boat and paid for by the plaintiffs for the groceries was deducted from the price paid to the captain for the latter's catch of fish. In addition to their groceries, the crew provided their own personal gear, such as foul weather clothes, boots and other wearing apparel, etc., which was in keeping with a long-standing custom in the fishing industry.

36.

After each trip the fish were unloaded at a plant in the presence of the captain or his delegate. The plant operator furnished the captain with a tally-sheet, showing the number of units (per 1000-fish) caught by the captain. From this information the captain would ascertain the amount he would receive from plaintiffs for his catch.

37.

The captain kept a daily payroll record of the amount to be paid to each crewman out of the proceeds paid

the captain for a particular catch of fish. This daily record reflected who comprised the crew for each catch, the rate paid to each member of the crew, together with rate variations (if any) for the same man and the number of units (per 1000-fish) of his participation in the catch. There was deducted from each crew member's share his portion of the cost of groceries and personal gear charged against the boat, together with any advances of money made against earnings. This payroll information was turned over bi-weekly by the captain to the processing plant. The plant's office compiled the captain's payroll data into a single payroll sheet showing the total amounts to be paid to the captain and each crewman bi-weekly. Checks were issued by plaintiffs to the captain and each crewman in such amounts as the captain, the plaintiff and each crew member had agreed upon. The checks were delivered to the captains who, in turn, distributed them among their crews. If the amount distributed by the captain among his crew exceeded the amount the captain received from the plaintiff for the sale of his catch, the plaintiff paid no additional amount; the excess was paid by the captain out of his own pocket.

38.

Each time and at the time a boat returned to port for unloading at a plant, the trip was over and the work of fishing on that trip was concluded. The captain was then in possession of the catch, which was owned by him and which he had agreed to sell to the plaintiffs at an agreed price per unit of 1000-fish.

39.

During this period, the boats were not refrigerated. Fishing trips, therefore, usually lasted a single day. The fishing was done in the vicinity of a fish processing plant so that the day's catch could be unloaded readily to avoid spoilage of the fish. This situation pertained in the Gulf of Mexico area particularly where the weather was warm. Occasionally fishing trips off the Carolina coast in the fall and winter season lasted several days where a day's catch was small and the weather was cold enough in the captain's judgment to preserve the quality of the fish already caught. The boat would then continue fishing until it could return with a large cargo of fish for unloading and sale. Menhaden being very perishable, it was to the interest of the captains and plaintiffs therefore, to unload and make immediate disposition of the catch upon reaching port.

40.

The captain would prepare for another trip as soon as practicable after unloading. It was to the interest of the parties, as well as the processing plants, to keep the boats fishing as often as practicable. But a boat would remain in port if, in the captain's judgment, it was unseaworthy and needed repairs or new nets, or if he believed weather conditions were unsuitable for fishing. These matters were left to the captain's discretion.

41.

The livelihood of a captain depended solely upon his initiative and skill as a fisherman, coupled with the probables of weather and the run of the menhaden. He may have exerted his efforts for long or short periods of time and have no claim to earnings or compensation of any kind, while, on the other hand, he may have been well rewarded by large catches made in a short space of time. While plaintiffs did not pay a captain a salary and did not guarantee any captain a profit from his fishing, plaintiffs did guarantee each captain a market for his catch (if there was one) at a price agreed upon at the beginning of the fishing season. Thus each captain was assured that all his catches brought to a plant designated by plaintiffs would not be lost by spoilage.

42.

If a particular trip in the season was unsuccessful, known in the trade as a "broker," and the value of the catch was insufficient to cover the captain's portion of the expenses of a trip, the captain's portion of the expenses would be carried over to succeeding trips to be deducted from the price of the fish paid the captain for subsequent catches. The unpaid expenses were regarded as a personal obligation of the captain. However, if the captain's portion of expenses for groceries charged to the boat was unpaid at the close of the season, the plaintiffs usually paid it. But if bonus money was due the captain, it was sometimes used to pay any outstanding grocery bill.

43.

A captain could and often did obtain advances of money from plaintiffs. The advances were repaid out of the proceeds from the future sale of catches to the plaintiffs. Advances to crewmen by the plaintiffs were made only with the express permission of the captain who was personally charged with their repayment. The captain in turn would charge the amount against the crewman's share which had been agreed upon between him, the captain, and set by the plaintiff.

44.

There was no express agreement specifying the extent to which the plaintiffs had control over the fishing activities of the captains. It was clear that no actual control was exercised over the details, manner or methods employed by the captains and their crews.

45.

The plaintiffs' boats were equipped with radios through which the captains maintained contact with each other while fishing to aid in finding the schools of menhaden fish. The plaintiffs did not interfere in the captain's use of the communications facilities. The processing plants furnished airplanes and pilots to the venture as spotters and observers to assist the captains in locating schools of fish. Radio communications between the planes and plaintiffs' boats were maintained for this purpose. The captains had the right to accept or reject this service and to exercise their own judg-

ment as it best served their interests. No charge for the plane spotter service was made to the plaintiffs by the plants.

46.

The plaintiffs did have the right to control the results of a captain's work and interfered in the process to some degree to assure a proper result from the undertaking.

47.

Ordinarily a captain completed a fishing season before leaving the boat for any reason. There was no evidence of termination of any relationship or contract during a season. But if fish were scarce and the captain could not keep his crew, a captain would have terminated the arrangement before the season was over. Termination may also result during a season by reason of the captain's ill health. A plaintiff may have terminated relations and declined to give a boat to a captain who had been unable to produce adequate catches of fish during a prior season. Captains had the right to, and did, contract with plaintiff's competitors or with plaintiff boat owners other than those whose boats they fished for a prior season.

48.

The plaintiffs had no agreement with the captains which entitled them to a preferred call on all the time and services of the captains.

49.

The plaintiffs had no actual control over the crewmen, nor did they exercise any control over the latters' activities through the captains.

50.

The plaintiffs filed proper employment tax returns with the Internal Revenue Service during the period here in issue and paid employment taxes on the earnings of the captains and crewmen.

51.

The plaintiffs filed timely claims for refund of their portion of the Federal Insurance Contributions Act taxes and Unemployment Act taxes paid on the earnings of the captains and crewmen. The claims were never acted upon by the Internal Revenue Service. These suits which followed were timely filed.

CONCLUSIONS OF LAW

1.

This Court has jurisdiction of the parties and these actions pursuant to the provisions of Title 28, Section 1340 and Section 1346(a), United States Code.

2.

The provisions of Sections 3121(d) and 3306(i), In-

ternal Revenue Code [26 U.S.C. §§ 3121(d) and 3306(i)] provide that the common-law rules are applicable in determining who are employees under the Federal Insurance Contributions Act and Federal Unemployment Tax Act.[1]

3.

The defendant's contention that the common-law governing the relationship of the taxpayer and the fishermen in pursuing fishing ventures in the Gulf of Mexico and the Atlantic Ocean is the general maritime law is without merit.

4.

In determining whether, under the common-law test, an individual is an employee for tax purposes, the decisions of the federal courts, rather than those of the various states, are controlling.[2]

5.

The facts in this case are not on all fours with those in the *Crawford* suit (Note 1). The basic difference is that here the plaintiff set the pay scale of the crewmen and fixed the number of crewmen that the captain could hire. All the other factors are essentially the same.

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[1]United States v. Crawford Packing Company, 330 F.2d 194 (1964).

[2]Loeb v. United States, 209 F.Supp. 22 (E.D. La. 1962); Williams Packing & Nav. Co. v. Enochs, 176 F.Supp. 168, affirmed 291 F.2d 402 (CA-5, 1961); Crossett Lumber Co. v. United States, 79 F.Supp. 20 (W.D. Ark. 1948).

Treasury Regulations on Employment Tax (1954 Code), relating to the Federal Insurance Contribution Act, Section 31.3121(d)-1 (c) sets forth rather accurately the common-law tests which should be applied in determining whether the relationship of employer and employee exists.[3] Applying the facts of this case to these tests, I conclude that the degree of control exercised by the plaintiff in marketing the fish was not such as to create the relationship of employer-employee. Since the Court in *Crawford* concluded that the facts there did not constitute sufficient control to establish the taxable relationship, then the added facts here would not be sufficient to support a contrary result.[4]

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[3]"(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules."

[4]United States v. Crawford Packing Co., supra; Williams Packing & Nav. Co. v. Enochs, supra; Star Fish & Oyster Co. v. United States, 223 F.Supp. 402.

5.

Plaintiffs severally are entitled to a refund of the Federal Insurance Contributions Act taxes and Federal Unemployment taxes claimed by reason of erroneous payments and unlawful collections thereof in amounts to be computed by the parties, together with interest and costs as may be allowed by law. If the amounts are not agreed upon, the same shall be settled on five days notice.

7.

Judgments will be entered for each of the several plaintiffs.

(Signed) FRED J. CASSIBRY
UNITED STATES
DISTRICT JUDGE

New Orleans, Louisiana
July 13, 1967

JUDGMENT

Filed: Aug. 7, 1967

United States District Court
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Inc.,
Carteret, Inc., and
C. B. Dey, Inc.,

Plaintiffs,

versus Civil Action No. 15170
Section "E"

United States of America,

Defendant.

THIS CAUSE came on to be heard before the Court sitting without a jury, upon Complaint of the plaintiffs,

(1) W. M. Webb, Incorporated,

(2) Carteret, Incorporated, and

(3) C. P. Dey, Incorporated,

for refund of Federal employment taxes erroneously paid and collected.

After consideration of the pleadings, depositions, testimony and exhibits in open Court, together with ar-

guments and briefs of counsel, and the Court having made and filed its Findings of Fact and Conclusions of Law on July 13, 1967 in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure, it is by the Court,

ORDERED AND ADJUDGED:

(1) That judgment be entered for the plaintiff W. M. Webb, Incorporated, and against the United States of America in the amount of $2,388.90, together with interest and costs; further,

(2) That judgment be entered for the plaintiff Carteret, Incorporated, and against the United States of America in the sum of $1,082.68; together with interest and costs; further,

(3) That judgment be entered for the plaintiff C. B. Dey, Incorporated, and against the United States of America in the amount of $249.10, together with interest and costs.

IT IS FURTHER ORDERED, that the foregoing Judgments so entered are subject to this Court's retention of jurisdiction so that should the computation by the Internal Revenue Service of the amounts to be refunded differ from the amounts contained in the Judgments, said Judgments may be amended without objection by the plaintiffs.

DONE AND ORDERED in Chambers, at New Orleans, Louisiana, this 7 day of August, 1967.

(Signed) FRED J. CASSIBRY
UNITED STATES
DISTRICT JUDGE

Approved as to form:

(Signed) JOSEPH J. LYMAN
Joseph J. Lyman
Attorney for Plaintiffs
1200 - 13th St. N.W.
Washington, D. C.

(Signed) JOHN O. JONES
John O. Jones
Tax Div. - Dept. of Justice
Attorney for Defendant
Fort Worth, Texas

JUDGMENT

Filed: Aug. 7, 1967

United States District Court
Eastern District of Louisiana
New Orleans Division

Louisiana Bunkers, Incorporated,
Plaquemines Bunkers, Incorporated,
Charles S. Wallace, III, Incorporated,
Plaintiffs

versus Civil Action No. 15171
Section "E"

United States of America,
Defendant.

THIS CAUSE came on to be heard before the Court sitting without a jury, upon Complaint of the plaintiffs,

(1) Louisiana Bunkers, Incorporated,

(2) Plaquemines Bunkers, Incorporated, and

(3) Charles S. Wallace, III, Incorporated,

for refund of federal employment taxes erroneously paid and unlawfully collected.

After consideration of the pleadings, depositions,

testimony and exhibits in open court, together with arguments and briefs of counsel, and the Court having made and filed its Findings of Fact and Conclusions of Law on July 13, 1967, in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure, it is by the Court,

ORDERED AND ADJUDGED,

(1) That judgment be entered for the plaintiff Louisiana Bunkers, Incorporated, and against the United States of America in the amount of $2,254.75, together with interest and costs; further,

(2) That judgment be entered for the plaintiff Plaquemines Bunkers, Incorporated, and against the United States of America in the amount of $1,005.32, together with interest and costs; further,

(3) That judgment be entered for the plaintiff Charles S. Wallace, III, Incorporated, and against the United States of America in the amount of $1,498.83, together with interest and costs.

IT IS FURTHER ORDERED, that the foregoing Judgments so entered are subject to this Court's retention of jurisdiction so that should the computation by the Internal Revenue Service of the amounts to be refunded differ from the amounts contained in the Judgments, said Judgments may be amended without objection by the plaintiffs.

DONE AND ORDERED in Chambers, at New Orleans, Louisiana, this 7th day of August, 1967.

(Signed) FRED J. CASSIBRY
UNITED STATES
DISTRICT JUDGE

Approved as to form:

(Signed) JOSEPH J. LYMAN
Joseph J. Lyman
Attorney for Plaintiffs

(Signed) JOHN O. JONES
John O. Jones
Tax Div. - Dept. of Justice
Attorney for Defendant.

CERTIFICATE

I, the undersigned reporter, DO HEREBY CERTIFY that the above and foregoing is a true and correct transcription of the stenographic (Stenotype) notes of the proceedings herein, taken down by me and transcribed under my supervision, at the time and place heretofore noted, in the above-entitled and numbered cause(s).

(Signed) PAUL W. WILLIAMS
Reporter

JUDGMENT

Filed: Aug. 7, 1967

United States District Court
Eastern District of Louisiana
New Orleans Division

Santos Menhaden Corporation, Citation, Incorporated, and Novelty, Incorporated,
Plaintiffs,

versus Civil Action No. 15172
Section "E"

United States of America,
Defendant.

THIS CAUSE came on to be heard before the Court sitting without a jury, upon Complaint of the plaintiffs,

(1) Santos Menhaden Corporation,

(2) Citation, Incorporated, and

(3) Novelty, Incorporated,

for refund of federal employment taxes erroneously paid and unlawfully collected.

After consideration of the pleadings, depositions, testimony and exhibits in open court, together with arguments and briefs of counsel, and the Court having made and filed its Findings of Fact and Conclusions of law on July 13, 1967, in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure, it is by the Court,

ORDERED AND ADJUDGED,

(1) That judgment be entered for the plaintiff Santos Menhaden Corporation, and against the United States of America in the amount of $3,655.16, together with interest and costs; further,

(2) That judgment be entered for the plaintiff Citation, Incorporated, and against the United States of America in the amount of $2,843.88, together with interest and costs; further,

(3) That judgment be entered for the plaintiff Novelty, Incorporated, and against the United States of America in the amount of $801.25, together with interest and costs.

IT IS FURTHER ORDERED, that the foregoing Judgments so entered are subject to this Court's retention of jurisdiction so that should the computation by the Internal Revenue Service of the amounts to be refunded differ from the amounts contained in the Judgments, said Judgments may be amended without objection by the plaintiffs.

DONE AND ORDERED in Chambers, at New Orleans, Louisiana, this 7th day of August, 1967.

(Signed) FRED J. CASSIBRY
UNITED STATES
DISTRICT JUDGE

Approved as to form:

/s/ JOSEPH J. LYMAN
Joseph J. Lyman
Attorney for Plaintiffs

/s/ JOHN O. JONES
John O. Jones
Tax Div. - Dept. of Justice
Attorney for Defendant

JUDGMENT

Filed: Aug. 7, 1967

United States District Court
Eastern District of Louisiana
New Orleans Division

Patterson Menhaden, Incorporated
and Aggie & Millie, Incorporated,
Plaintiffs,

versus Civil Action No. 15215
Section "E"

United States of America,
Defendant.

THIS CAUSE came on to be heard before the Court sitting without a jury, upon Complaint of the plaintiffs.

(1) Patterson Menhaden, Incorporated, and

(2) Aggie & Millie, Incorporated,

for refund of federal employment taxes erroneously paid and unlawfully collected.

After consideration of the pleadings, depositions, testimony and exhibits in open court, together with arguments and briefs of counsel, and the Court having made and filed its Findings of Fact and Conclusions of Law on July 13, 1967 in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure, it is by the Court,

ORDERED AND ADJUDGED,

(1) That judgment be entered for the plaintiff Patterson Menhaden, Incorporated, and against the United States of America in the amount of $2,520.43, together with interest and costs; further,

(2) That judgment be entered for the plaintiff Aggie & Millie, Incorporated, and against the United States of America in the amount of $1,339.63, together with interest and costs.

IT IS FURTHER ORDERED, that the foregoing Judgments so entered are subject to this Court's retention of jurisdiction so that should the computation by the Internal Revenue Service of the amounts to be refunded differ from the amounts contained in the Judgments, said Judgments may be amended without objection by the plaintiffs.

DONE AND ORDERED in Chambers, at New Orleans, Louisiana, this 7th day of August, 1967.

(Signed) FRED J. CASSIBRY
UNITED STATES
DISTRICT JUDGE

Approved as to form:

(Signed) JOSEPH J. LYMAN
Joseph J. Lyman
Attorney for Plaintiffs

(Signed) JOHN O. JONES
John O. Jones
Tax Div. - Dept. of Justice
Attorney for Defendant

JUDGMENT

Filed: Aug. 7, 1967

United States District Court
Eastern District of Louisiana
New Orleans Division

G. B. L., Incorporated,
Merlin, Incorporated, and
Frances Louise and Patricia Ann Webb,
t/a Webb-Bunker Company,
Plaintiffs,

versus Civil Action No. 15216
Section "E"

United States of America,
Defendant.

THIS CAUSE came on to be heard before the Court sitting without a jury, upon Complaint of the plaintiffs,

(1) G. B. L., INCORPORATED,

(2) MERLIN, INCORPORATED, and

(3) FRANCES LOUISE and PATRICIA ANN WEBB, t/a Webb-Bunker Company,

for refund of federal employment taxes erroneously paid and unlawfully collected.

After consideration of the pleadings, depositions, testimony and exhibits in open court, together with arguments and briefs of counsel, and the Court having made and filed its Findings of Fact and Conclusions of Law on July 13, 1967, in accordance with the provisions of Rule 52 of the Federal Rules of Civil Procedure, it is by the Court,

ORDERED AND ADJUDGED,

(1) That judgment be entered for the plaintiff G.B.L., Inc., and against the United States of America in the amount of $2,295.65, together with interest and costs; further,

(2) That judgment be entered for the plaintiff Merlin, Incorporated, and against the United States in the amount of $1,135.23, together with interest and costs; further,

(3) That judgment be entered for the plaintiffs Frances Louise and Patricia Ann Webb, t/a Webb-Bunker Company, and against the United States of America in the amount of $1,484.58, together with interest and costs.

IT IS FURTHER ORDERED, that the foregoing Judgments so entered are subject to this Court's retention of jurisdiction so that should the computation by the Internal Revenue Service of the amounts to be refunded differ from the amounts contained in the Judgments, said Judgments may be amended without objection by the plaintiffs.

DONE AND ORDERED in Chambers, at New Orleans, Louisiana, this 7th day of August, 1967.

(Signed) FRED J. CASSIBRY
UNITED STATES
DISTRICT JUDGE

Approved as to form:

(Signed) JOSEPH J. LYMAN
Joseph J. Lyman
Attorney for Plaintiffs

(Signed) JOHN O. JONES
John O. Jones
Tax Div. - Dept. of Justice
Attorney for Defendant

NOTICE OF APPEAL

Filed: Oct. 9, 1967

In the United States District Court for the
Eastern District of Louisiana
New Orleans Division

W. M. Webb, Incorporated,
Cartaret, Incorporated,
C. P. Dey, Incorporated,

Plaintiffs,

versus Civil No. 15170
Section "E"

United States of America,

Defendant.

NOTICE IS HEREBY GIVEN that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered herein on August 7, 1967.

LOUIS C. LaCOUR
United States Attorney
(Signed) JOHN O. JONES
JOHN O. JONES
Attorney, Tax Division
Department of Justice
7A06 Federal Building
Fort Worth, Texas 76102
ATTORNEY FOR
DEFENDANT

NOTICE OF APPEAL

Filed: Oct. 9, 1967

In the United States District Court for the
Eastern District of Louisiana
New Orleans Division

Louisiana Bunkers, Inc.,
Plaquemines Bunkers, Inc.,
And Charles S. Wallace, III, Inc.,
Plaintiffs

versus Civil No. 15171
Section "E"

United States of America,
Defendant

NOTICE IS HEREBY GIVEN that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered herein on August 7, 1967.

LOUIS C. LaCOUR
United States Attorney
(Signed) JOHN O. JONES
JOHN O. JONES
Attorney, Tax Division
Department of Justice
7A06 Federal Building
Fort Worth, Texas 76102
ATTORNEY FOR
DEFENDANT

NOTICE OF APPEAL

Filed: Oct. 9, 1967

In The United States District Court for the Eastern District of Louisiana

Santos Menhaden Corporation,
Citation, Incorporated and Novelty, Incorporated,
Plaintiffs,

v. Civil No. 15172
Section "E"

United States of America,
Defendant.

NOTICE IS HEREBY GIVEN that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered herein on August 7, 1967.

LOUIS C. LaCOUR
United States Attorney
(Signed) JOHN O. JONES
JOHN O. JONES
Attorney, Tax Division
Department of Justice
7A06 Federal Building
Fort Worth, Texas 76102
ATTORNEY FOR
DEFENDANT

NOTICE OF APPEAL

Filed: Oct. 9, 1967

In the United States District Court for the
Eastern District of Louisiana
New Orleans Division

Patterson Menhaden, Incorporated,
and Aggie & Millie, Incorporated,
Plaintiffs

versus Civil Action No. 15215
Section "E"

United States of America,
Defendant

NOTICE IS HEREBY GIVEN that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered herein on August 7, 1967.

LOUIS C. LaCOUR
United States Attorney
(Sigend) JOHN O. JONES
JOHN O. JONES
Attorney, Tax Division
Department of Justice
7A06 Federal Building
Fort Worth, Texas 76102

NOTICE OF APPEAL

Filed: Oct. 9, 1967

In the United States District Court for the
Eastern District of Louisiana
New Orleans Division

G. B. L., Incorporated,
Merlin, Incorporated, and
Frances Louise and Patricia Ann
Webb, t/a Webb-Bunker Company,
Plaintiffs

versus Civil Action No. 15216

United States of America,
Defendant

NOTICE IS HEREBY GIVEN that the defendant, United States of America, hereby appeals to the United States Court of Appeals for the Fifth Circuit from the final judgment entered herein on August 7, 1967.

LOUIS C. LaCOUR
United States Attorney
(Signed) JOHN O. JONES
JOHN O. JONES
Attorney, Tax Division
Department of Justice
7A06 Federal Building
Fort Worth, Texas 76102
ATTORNEY FOR
DEFENDANT

In the United States Court of Appeals for the Fifth Circuit

No. 25674

UNITED STATES OF AMERICA, APPELLANT

v.

W. M. WEBB, INCORPORATED, ET AL, APPELLEES

Appeals from the United States District Court for the Eastern District of Louisiana

(November 6, 1968)

Before COLEMAN and MORGAN, Circuit Judges, and HUNTER, District Judge

HUNTER, *District Judge*: These tax refund cases involve similar questions of law and fact, and were consolidated by agreement of the parties. The sole question presented is whether fishermen (captains and crews) operating menhaden fishing boats owned by the taxpayers, were their employees for purposes of the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) within the meaning of Sections 3121, et seq., and 3306, et seq., of the Internal Revenue Code of 1954; 26 U.S.C.A. § 3121 et seq., and 3306 et seq. The district court, after a full trial, entered its findings of fact and conclusions of law. It concluded that for the purposes of the two Acts the fishermen were not employees of the taxpayers. The Government appeals and raises two speci-

fications of error: First, that the district court erred in ignoring principles of general maritime law in its evaluation of the relationshp between the taxpayers and the fishermen. The second error asserted that even in the absence of the principles of general maritime law, this record establishes as a matter of law that the captains and crews were employees of the respective taxpayers.

All agree that both Acts impose taxes upon employers measured by the compensation paid to employees, and as defined by the statutes for our purposes is the same. Section 3121(d) reads in pertinent part:

> The term "employee" means—
> (1) any officer of a corporation; or
> (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or * * *[1]

and Section 3306(i) reads:

> The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

The present definitions of the term "employee" have a common genesis. The Supreme Court in 1947, because of a lack of decisional uniformity in defining "em-

[1] "Succeeding subsections specifically include in the category of employees persons engaged in a number of quite irrelevant occupations such as agent or commission drivers distributing specified products, full time life insurance salesmen, certain home workers and traveling salesmen." *United States* v. *Thomson*, 282 F. 2d 157, 158, ftn. 1 (C.A.-1, 1960). Fishermen were not included in this group.

ployee" under the Social Security Act, decided the cases of *United States* v. *Silk*, 331 U.S. 704; and *Bartels* v. *Birmingham*, 332 U.S. 126, therein setting forth broad general guidelines to courts and agencies. As a consequence of these decisions, the Treasury Department proposed a new regulation defining the employer-employee relationship on the basis of an economic reality test. This proposed regulation caused considerable criticism in Congress and led to enactment in June, 1948, of J.H. Resolution 296 (62 Stat. 438) over President Truman's veto. The legislative history of this resolution makes it clear that the Congress meant to and did emphatically reject the economic reality test proposed by the Treasury Department, but did *lend* its approval of the Supreme Court decisions as they were interpreted by the Senate Committee.[2] Thereafter, amendments were enacted which redefined the term "employee." These amendments have been carried over into the Revenue Code of 1954 as heretofore quoted.[3] This common-law concept is described in the current Treasury Regulations on Employment Tax (1954) Code, Section 31.3121(d) 1(c):

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[2] "In view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an 'employee' for purposes of applying the Social Security Act. And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act." (2 U.S.C. Cong. Serv. (1948), p. 1785.)

[3] The legislative history of the amendments was considered by this Court in *United States* v. *Crawford Packing Company*, 330 F. 2d 194, 195 (1964), and by other courts in various cases including *United States* v. *Thorson*, 282 F. 2d 157, 159 (C.A. 1st, 1960); *Ringling Bros. Barnum & Bailey Com. Shows* v. *Higgins*, 189 F. 2d 865, 869 (C.A. 2d, 1951); *Party Cab Co.* v. *United States*, 171 F. 2d 87, 89–91 (C.A. 7th, 1949); and *Hoosier Home Improvement Co.* v. *United States*, 350 F. 2d 640 (C.A. 7th, 1965).

§ 31.3121(d)–1 *Who are employees.*

* * *

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

Against this background the record here shows that the appellee-taxpayers, owners of menhaden fishing boats contracted verbally with captains, selected by them, to catch menhaden fish. The owners relinquished control of the boats to the captains who staffed and provisioned them as they saw fit without interference from the owners. The captains agreed, without a guarantee of earnings of any kind, to make fishing trips for a season and to return the catches to a plant designated by the owners. The boat owners paid the captains an agreed price for each 1,000 fish caught and delivered. In addition to the price paid per 1,000 fish unit, taxpayers also paid the captains an additional amount per unit as a "bonus." Payments were made to the crew in such amounts as the crewmen and captain negotiated, based on the number of units of fish the crewmen helped to catch. The district judge concluded that the degree of control was not such as to create the relationship of employer-employee between the owners and the captains and crewmen.

The Government suggests that we promulgate a new test in this area by applying principles of General Maritime Law in the determination of whether the captains and crews were the employees of the respective taxpayers, and alternatively, argues that even in the absence of General Maritime Law principles, the record here conclusively establishes that under the traditional "common law test" included in the regulations, the captains and crews were employees of taxpayers.

Does a realistic application of common law tests require the relationship of the owners to the captains and crews be evaluated under principles of general maritime law? The "ancient solicitude of courts of Admiralty for those who labor at sea continues unchanged, despite the progress from canvas sails to diesel engines."[4] In non-tax context when courts are asked to determine whether seamen are employees of the vessel's owner, all ambiguities or doubts are resolved in favor of the seamen. Today, the law is clear that in both categories of cases—Jones Act, and maintenance and cure—the owner of the vessel is the employer unless the vessel is held under a demise charter. The arrangements here certainly did not constitute demise charters. If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court. This is so because it is clear that under maritime law the captain is the agent of the owner (on the facts here) and the crew hands are employees.

However, the first matter to consider in any tax case is: What are the words of the statute? The words of the statute here are clear and explicit. The determination of the relationship is to be made on the basis of common law tests. It seems questionable, at best, whether Congress, in re-affirming the use of the common law test, intended thereby to incorporate maritime law under the FICA and FUTA. Moreover, maritime law was urged as a controlling factor by the Government in *United States* v. *Crawford Packing Company* (supra). There, the proposition was extensively briefed and argued to this Court, which sustained the trial court's findings and conclusions in *Crawford,* and sub silentio rejected the government's

[4] *Hudspeth* v. *Atlantic and Gulf Stevedores, Inc.*, 266 F. Supp. 937.

maritime-oriented definition of "employee" for tax purposes. We note that in 1967 the Treasury Department unsuccessfully proposed to Congress that the definition of "employee" under 3121(d), Internal Revenue Code, be amended to include all captains and crewmen of commercial fishing boats, with the exception of fishermen who chartered boats from owners, who, in turn, had no interest in the catch.[5] Had the Treasury's proposal been accepted, it would have mooted the issue in this case. The Committee's rejection of the proposal indicates to us Congress's intention to retain the common law control test as the sole test for defining "employee" for tax purposes, whether they be maritime personnel or other types of employees.[6]

Questions of maritime law aside, the Government presses with vigor the argument that the facts here

[5] Social Security Amendments of 1967, H.R. 12080, as amended by the Senate. Section 504(b)(1)(2), 90th Congress, 1st Session. It was reported out of the Senate Finance Committee, Sen. Rept. No. 744 on November 14, 1967, 90th Cong. 1st Sess., p. 320, stating that the proposed amendment "identifies captains and crew members of fishing vessels as employees for purposes of Title II of the Social Security Act * * * irrespective of the common law status of these persons. The amendment thus makes it unnecessary to determine the status of these persons under the common law rules applicable to an employer-employee relationship."

[6] The bill (H.R. 12080) was referred to a committee of conference, Conference Rept. No. 1030, Dec. 11, 1967, 90th Cong., 1st Sess. The Report, at p. 74, disclosed that "The Senate recedes" with respect to its amendment of Section 3121(d), Internal Revenue Code. It is interesting to note that H.R. 12080, as passed by the House of Representatives, proposed various amendments to sections of the Internal Revenue Code, but no attempt was made by the House of Representatives to alter the definition of "employee" in Section 3121(d), nor was the status of fishermen mentioned. House Rept. No. 544, August 7, 1967, 90th Cong., 1st Sess. p. 144.

are such as to preclude the decision of the district court. The district court delineated with some elaboration the relationship between the owners and the captains and crewmen. We refer to the findings of that court which makes it unnecessary for us to state the facts in detail. *Webb, Inc., et al* v. *United States,* 271 F. Supp. 249. Here, as in *Crawford,* there is no difficulty in stating that the question of status is to be determined under common law rules. This case is difficult, as have been others like it of recent vintage. The following decisions in this circuit, on facts substantially similar to those in this case, have concluded that the workers and captains were not employees within the meaning of the two acts: *Crawford Packing Company* v. *United States,* 228 F. Supp. 549, aff'd 330 F. 2d 194 (5th Cir., 1964); *Star Fish and Oyster Company* v. *United States,* 223 F. Supp. 402 (S.D. Ala., 1963); *Williams Packing and Navigation Company* v. *Enocks,* 176 F. Supp. 168 (S.D. Miss., 1958), aff'd 291 F. 2d 402 (5th Cir., 1961), reversed on jurisdictional grounds, 307 U.S. 1; *Williams Packing Company* v. *United States,* Civil Action No. 2631 (S.D. Miss., 1964); *Sea Garden Corporation, et al* v. *United States,* No. 64-9-Cir-J (M.D. Fla., 1965); *Gulf Boats, Inc.* v. *United States,* No. 2368 (S.D. Miss., 1962). On the other hand, courts have concluded, also on facts close to this case, that the captains and deck hands were employees. *Jackson* v. *Phinney,* 266 F. Supp. 835 (W.D. Tex., 1967); *Kirkconnell* v. *United States,* 347 F. 2d. 260 (Ct. of Claims, 1965); *Cape Shore Fishing Company* v. *United States,* 330 F. 2d 961 (Ct. of Claims, 1964); *Capital Trawlers, Inc.* v. *United States,* 324 F. 2d 506 (1st Cir., 1963). The excellent briefs point to many cases, but these suffice to reveal the diversity of thinking. There is a hankering for something definite and absolute, but the jurispru-

dence teaches us that there is no perfect and unchanging formula.

The Government's argument that a pure question of law is presented here does not conform to the weight of authority. Under the rule of *Commissioner* v. *Duberstein,* 363 U.S. 278 (1960), a tax case, a reviewing court must affirm the district court unless it can be said that its basic findings were clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure. We find that here there is ample evidence to support the finding of the district court. It might have found otherwise on the evidence adduced, but since we cannot say that those which were made were "clearly erroneous," we accept them under the mandate of Rule 52(a), F.R.C.P. Accepting these findings, the ultimate conclusion that the captains and crewmen were not employees necessarily follows. *United States* v. *Crawford Packing Company* (5th Cir., 1964), 330 F. 2d 194. The judgments for the taxpayers are affirmed.[1]

[1] The average crew consisted of 24 men. Each captain selected his own crew and controlled them. The question of whether or not the crew members were "employees" of the captain for the purposes of Federal Insurance Contributions Act taxes and Federal Unemployment Act taxes is not before us.

United States Court of Appeals for the Fifth Circuit

October Term, 1968

No. 25674

D.C. Docket Nos. CA 15170, 15171, 15172, 15215 and 15216

UNITED STATES OF AMERICA, APPELLANT

v.

W. M. WEBB, INCORPORATED, ET AL., APPELLEES

Appeals from the United States District Court for the Eastern District of Louisiana

Before COLEMAN and MORGAN, Circuit Judges, and HUNTER, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellant, United States of America, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

NOVEMBER 6, 1968.

Issued as Mandate: November 29, 1968.

Supreme Court of the United States

October Term 1968

No. 1124

UNITED STATES, PETITIONER

v.

W. M. WEBB, ET AL.

Order allowing certiorari. Filed April 28, 1969

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. ——

UNITED STATES OF AMERICA,

v.

W. M. WEBB, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgments of the Court of Appeals for the Fifth Circuit in these cases.

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 218–241)[1] are not officially reported. The opinion of the court of appeals (App. A, pp. 1a–9a) is reported at 402 F. 2d 956.

JURISDICTION

The judgments of the court of appeals were entered on November 6, 1968. (App. B, p. 10a). On January 30, 1969, Mr. Justice Black extended the time for

[1] "R." refers to the printed record in court of appeals. "Supp. R." refers to the supplemental printed record in the court of appeals.

335-449—69——1

filing a petition for a writ of certiorari to and including February 19, 1969. On February 13, 1969, Mr. Justice Black further extended the time for filing a petition to and including March 6, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the captains and crews on fishing boats are employees of the owner for the purposes of the Federal Insurance Contributions Act, 26 U.S.C. 3121 *et seq.* and Federal Unemployment Tax Act, 26 U.S.C. 3306 *et seq.*, when they are engaged under the so-called "lay" or similar system whereby the captain has discretion in hiring and firing the crew and the captains' and crews' compensation is a share of the value of catch.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Sections 3111, 3121, 3301, and 3306 of the Internal Revenue Code of 1954 and Sections 31.3121(a)–1, 31.3121(d)–1, 31.3306(b)–1, and 31.3306(i)–1 of the Treasury Regulations on Employment Tax are printed in Appendix, *infra*, pp. 11a–17a.

STATEMENT

The fourteen respondents in these cases are engaged in the business of fishing for menhaden, an inedible fish.[2] Their business activities embrace ownership of fishing boats, fishing for the menhaden both in the Atlantic Ocean and the Gulf of Mexico through arrangements with various captains, and the disposal of the catch to fish processing plants. (R. 232.)

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[2] Menhaden fish are processed into fish meal and a fish "solubile," which is used for commercial feed. It is also processed into fish oil, which is used as a base in paints.

The term of the captains and crews varied. It was understood that the term for captains was to last an entire fishing season; it was custom and practice that it last for an entire season. Some captains fished consecutive seasons for one of the respondents. The respondents and captains induced the crews to remain with the boats for an entire fishing season by payment of a bonus at the termination of a successful fishing season. (R. 231.)

Respondent hired the captains under an arrangement which could be terminated by either party, voluntarily or involuntarily, at the conclusion of any trip (R. 224). There was no special license or papers required to become a captain. Once a captain was selected, it was only necessary for him to register as captain of a boat with the Bureau of Customs. (R. 224.)

A captain was generally selected because the respondent had confidence in his honesty and integrity, and had trust in his ability to select, organize, and supervise a crew to operate the boat and conduct successful fishing operations (R. 223). When a captain's actions aboard ship were such as to endanger life or property, respondents severed relations with them (R. 218). The captains hired and fired the crew and supervised and controlled the crew's activities at sea (R. 227, 228, 229).

The respondents gave the captains various instructions. Thus, they required that intoxicating liquors were not to be taken aboard the boats, established restricted areas which were not to be fished, and required the captain to keep the boat clean, to keep the

engines in working order, and properly to moore and to watch the boat while in port. (R. 229.) Additionally, respondents fixed the number of crewmen to be hired,[3] the pay scale of the crew (R. 228), and the general area to fished, *i.e.*, the Gulf of Mexico or Atlantic Ocean (R. 225). They designated processing plants to which the catch was to be delivered (R. 224). The boats were equipped with "ship-to-shore" radios which permitted respondents or the processing plants to remain in contact with the boats. (R. 236). Since the boats were not refrigerated, the fishing trip usually lasted only a single day. Thus, the boats were usually docked after a day's catch was transferred to the plants. (R. 234.)

A captain could be fired if he failed to follow a respondent's instructions. (R. 224.) There is no evidence of a captain ever giving instructions to any respondent; rather, the captain on occasion made suggestions on such things as the size of the crew and the scale of pay. (R. 228.) However, the captains, to the exclusion of the respondents, had full charge of the crew during the day's fishing operations. (R. 228.) The captain determined when to depart from port and when to return, where to fish (within the broad geographic area designated by respondents), and how to fish. (R. 228.)

The captains and crews were paid on the basis of the volume of fish caught, i.e., a dollar amount for

[3] The average size of a crew was 24 men. While respondents, as owners, fixed that number, the captain had a right to commence the fishing trip with a smaller crew, if he first obtained the consent of respondents. (R. 227.)

each 1,000 pounds of fish caught and delivered. The rate was set by the respondents at the beginning of each fishing season. In addition, the respondents paid the fishermen a bonus also based upon the volume of fish caught and delivered.[4] The rate of pay, including the bonus, generally remained constant throughout a fishing season (R. 229). On the basis of records kept by the captains, respondents, biweekly, issued checks payable to captains and crews in the amount computed to be due (R. 233). Respondents and the owners of the processing plants shared in the proceeds from the sale of the catch and benefited by any increase in the market price of menhaden (R. 222).

The boats were outfitted and all repairs were made and paid for by the respondents. (R. 223.) They carried and paid for all insurance on the boats. Captains and crews provided all their own clothing and food. Neither captains nor crews had any investment in the boats. The respondents paid for all the fuel used by the boats during the fishing season. (R. 232.)

If a particular trip in the season were unsuccessful (a "broker"), the captain and crew received no pay. Amounts respondents advanced to the captains for payment for such things as groceries and other provisions were ordinarily deducted from the captains'

[4] The district court erroneously found that the captains owned their catch of menhaden and sold it to respondents at the prearranged rate of pay. (R. 221, 224, 229, 233.) These findings are contrary to the evidence. The Court of Appeals appears to have corrected this error by concluding (App. A, p. 5a) that the "* * * boat owners paid the captains at an agreed price per 1,000 fish caught and delivered."

and crews' pay. However, if a trip or series of trips were "brokers," the unpaid advances were applied against subsequent trips. If expenses were at the end of a season, respondents bore the loss. (R. 232, 235–236.)

The Commissioner of Internal Revenue determined that the captains and crews were employees of respondents within the meaning of the Federal Insurance Contributions Act and the Federal Unemployment Tax Act, and that respondents were liable for the employer's share of those taxes for the periods in issue. Respondents paid the taxes and commenced these refund suits in the district court. That court held that the respondents were not the employers. On the government's appeal, the Fifth Circuit affirmed (App. A).

REASONS FOR GRANTING THE WRIT

1. Conflicting approaches in the Fifth Circuit, on the one hand, and the Court of Claims, First Circuit, and the Social Security Administration, on the other, have created uncertainty and inequity in the application of the Social Security laws and the Federal Unemployment Compensation laws to those engaged in the fishing industry.

In this case, which involves menhaden fishermen in Lousiana, and in *United States* v. *Crawford Packing Co.*, 330 F. 2d 194, which involved shrimp fishermen from the Texas Gulf coast, the Fifth Circuit has sustained trial court findings that the captains and crew are not the employees of the boat owners, apparently relying on the degree of control that the captain exer-

cises over the hiring and day-to-day activities of the crew and the peculiar nature of compensation used in this industry. The Court of Claims, however, in two cases—one involving shrimp fishermen from the Texas Gulf coast and the other involving trawlermen from Massachusetts—has ruled that the captains and crew members are employees of the boat owners, and that the owners are therefore liable for the FICA and FUTA taxes. *Cape Shore Fish Co.* v. *United States,* 330 F. 2d 961; *Kirkconnell* v. *United States,* 347 F. 2d 260. The First Circuit reached the same result as the Court of Claims in *Capital Trawlers, Inc.* v. *United States,* 324 F. 2d 506, affirming per curiam, 216 F. Supp. 440 (D. Me.). The Social Security Administration also follows the latter position, which is set out in S.S.T. 387, 1940–1 Cum. Bull. 192. It, therefore, will allow benefits to any captain or crewman who applies, whether or not the boat owners who employed the applicant have paid the required taxes, since the employees are not bound by any judgment that the owner is not the employer.

There are no important factual differences among the above cited cases. Nor may any distinction be drawn between the instant case and several others that district courts in the Fifth Circuit have decided in a contrary fashion. This was confirmed by the Fifth Circuit below, which said in its opinion (Appendix A, p. 8a), "* * * courts have concluded on facts close to this case, that captains and deckhands were employees. *Jackson* v. *Phinney,* 266 F. Supp. 835 (W. D. Tex. 1967); *Kirkconnell* v. *United States,* * * *;

Cape Shore Fish Co. v. *United States,* * * *; *Capital Trawlers Inc.* v. *United States,* * * *".

In all of these cases, the salient facts were that boat owners secured captains to command the fishing vessels on the high seas, to hire and manage the crews, to manage the specific fishing operations, and to deliver the catch to specified docks whenever possible. In all cases, the captains and crews were paid a pre-arranged amount per unit of the catch returned to the docks. The captains, in these cases, exercised the same degree of control over the seafaring operations, and the owners' control over the captains was almost identical.

This system is, moreover, common to the fishing industry and finds its origins in traditional methods of hiring, controlling, and compensating seamen. See *Cape Shore Fish Co.* v. *United States, supra,* 330 F. 2d at 968–969. The only differences between the so-called "lay" system, used in the New England cases cited above, and the arrangements in this case and *Crawford Packing* are found in the degree of control the captain has over the sale of the catch. Under the lay arrangement, the catch is sold at auction; the captain has the authority to reject the bid as too low, and the captain receives the proceeds and distributes the money among the owner and the crew. In the present case, and in the other cases which have been litigated in the Fifth Circuit, the owner controls the terms of the sale, and the proceeds are paid directly to him. These differences, to the extent they bear on the result, should make the present case even more appropriate than the New England cases for the im-

position of FICA and FUTA taxes on the boat owners.

2. The court below sought to justify the different outcomes of the several cases on the ground (App. A, p. 9a) that the case does not involve "a pure question of law," and that "[u]nder the rule of *Commissioner* v. *Duberstein,* 363 U.S. 278 (1960), a tax case, a reviewing court must affirm the district court unless it can be said that its basic findings were clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure." The holdings in this and the similar cases represents, however, ultimate conclusions based upon undisputed facts. No question of intent or other subjective factor is pertinent. In such a posture, the holdings represent conclusions of law which are subject to plenary review on appeal.

This is demonstrated by *United States* v. *Silk,* 331 U.S. 704, 716, and *Bartels* v. *Birmingham,* 332 U.S. 126. In *Silk,* this Court, in reviewing the question of whether coal unloaders and truck drivers were employees for Social Security purposes, treated the problem as a question of law, even rejecting (331 U.S. at 716) "the concurrence of the two lower courts in a contrary result." And in reviewing the status of members of "dance bands" for the purposes of those tax statutes, this Court again, in *Bartels,* similarly treated the issue as one fully susceptible to review by an appellate tribunal.

There are, to be sure, "mixed" questions of fact and law involved here. But the legal element is the responsibility of the courts, and it is the function of the appellate courts to guaranty the application of standards

that provide a reasonable assurance of uniformity of result in cases having fact patterns as similar as those we have discussed above. Particularly here, where the factual elements are beyond dispute, it is essential that the federal courts of appeals act as this Court did in *Silk* and *Bartels* and assume the responsibility for ultimate decision. The lines of responsibility and duties and obligations in the mutual relationships of owner, captain and crew are established and clear. The sole question is who, in this particular circumstance, is the employer, and that is without doubt a question of law. It is only the appellate courts which can decide the question in a manner that provides guidance to the federal trial courts and, just as important as a practical matter, that allows responsible government officials and private counsel to advise their respective clients in order to resolve such problems as these without the need for litigation. The Fifth Circuit, however, by its course of decision in this case and in *Crawford Packing,* has made it impossible for the liabilities for federal employment taxes of a boat owner engaged in a fishing enterprise in the Fifth Circuit to be determined until the matter is submitted to a federal judge or jury.

The error of this approach is confirmed by statements of the Congress when it amended the Social Security Act following the decisions in *Silk* and *Bartels,* for it then made clear that it expected uniformity in the application of the Act to similar situations. Prior to 1948 the statute had no definition of "employee". In that year Congress, in an amendment made retroactive to August 14, 1935, with respect to

the Social Security Act, and to February 10, 1939, with respect to the Internal Revenue Code of 1939, provided (Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438) that the term "employee" "* * * does not include (1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules."

Then, in 1950 the term "employee" was redefined as "any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an employee." Act of Aug. 28, 1950, c. 809, Section 205(a), 64 Stat. 477, 536.

Congress made clear, however, that it did not intend to change the approach taken in *Silk* and *Bartels*. Thus it said (S. Rep. No. 1255, 80th Cong., 2d Sess., p. 7):

> In the view of your committee these decisions affirm that the usual common-law rules realistically applied, must be used to determine whether a person is an "employee" for purposes of applying the Social Security Act. *And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act.* [Emphasis supplied.]

Here the situation is not dissimilar from the authority often given to a foreman in an industrial plant, or to the employment office in a branch or division of a large company. The fact that the local manager, or one of his subordinates, has power to hire and

fire, and within considerable limits, to fix duties and conditions of employment does not mean that the persons hired are the manager's employees rather than those of the company—whose headquarters may, in fact, be far away. And a contrary ruling by the finder of fact cannot insulate the result from correction on appeal, if the courts are to implement the statute in accordance with the expectations that Congress expressed in 1948.

3. The Fifth Circuit's construction of the phrase "common law rules" as it appears in Section 3121(d)(2) conflicts with the manner in which the statute was applied by the Court of Claims in *Cape Shore Fish Co.* v. *United States, supra.* Application of the common law rules requires an evaluation of a variety of factors, most important of which is the degree of control that the purported employer may exercise over the purported employees. The relative discretion exercised by fishing boat captains over the hiring and firing of crews, the fishing schedules, and the shipboard activities have plainly been the most important element in the decision of the Fifth Circuit to sustain the result reached in the trial court in this case and in *Crawford Packing.*

Although it is clear that the captain does not have complete control of these matters, is restriced by metes and bounds established by the owner, and in many respects is subject to the veto of the owner, it is recognized that the captain's discretion is usually broad, at least in comparison to many land-based industries. However, most of his discretion is necessarily dictated by the nature of the activity—that

it takes place away from shore—and the owner's ability to exercise control has always been severely limited, at least until the invention of modern methods of communication. But this is true in every maritime activity. And under maritime law, this relative lack of day-to-day control has never been thought to allow the boat owner to escape the duties that the maritime employer owes his employees—as for example in providing maintenance and cure. It is well established in the maritime cases, indeed, that these obligations exist except when there is a bareboat, or demise, charter.

In our view, Congress, in using the phrase "common law rules", used those words in a generic rather than a technical sense. There is nothing in the legislative history to ascribe to Congress the anomalous intent of having maritime activities subject to standards, for social security purposes, that were developed in the context of land based enterprises and are entirely inappropriate in relation to enterprises conducted at sea. Rather, we should suppose that Congress intended that the employer-employee relationship be evaluated according to the standards that have been traditionally applied in the context of a particular industry. Were this not so, it would be impossible to conclude in the usual case that a seaman is the employee of a boat owner unless the owner happens to be on board ship throughout the voyage. Moreover, to ascribe such a view to Congress would be inconsistent with the thought expressed in Section 3306(c)(17) of the Social Security Act, 26 U.S.C. 3306(c)(17) (App. B., p. 13a), which exempts fishermen from social security coverage, except when on ships over ten tons in dis-

placement. The inference is clear that Congress was of the view that "common law rules" would be applied to ships of the greater tonnage, and this makes sense only if the phrase is construed in the manner in which we have proposed.

The Fifth Circuit, however, declined to hold that (App. A, p. 6a) "the relationship of the owners and crews be evaluated under principles of general maritime law". Yet it nevertheless remarked (ibid.):

> If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court. This is so because it is clear that under maritime law the captain is the agent of the owner (on the facts here) and the crew hands are employees.

In *Cape Shore Fish Co.* v. *United States, supra,* however, the Court of Claims expressly noted that the captain's control and crew's participation in the proceeds of the voyage gave no support to the owner's contention that the crew members were not employees. The court observed that under maritime law that method of hire, known for centuries as the "lay" system, was considered merely a method by which the owner paid his employees and did not identify the relationship as a partnership or joint venture. 330 F. 2d, at 968–969. The Court of Claims examined the maritime cases in detail, and relied for its conclusion on the fact that under maritime law the arrangements in that case would not have sufficed to relieve the boat

owner of the employer's traditional obligations to his seamen.

Thus the Court of Claims and the Fifth Circuit are in disagreement as to the relevance under Section 3121(d) of the maritime law characterization of such seafaring arrangements as existed in this and the similar cases. In both cases, the factors relied on by the ship owners to negate the employer-employee relationship would not have that effect under maritime law principles; thus the opposing constructions given the term "common law rules" by the two courts is central to the contrary results reached in the two forums and presents an appropriate issue for resolution by this Court.

4. By its approach, the Fifth Circuit has made it impossible to administer the Social Security and Unemployment Compensation statutes in an even-handed manner in the context of the fishing industry. This may best be shown by the cases involving shrimp fishermen in Texas; notwithstanding the complete identity of circumstances, the result depends entirely on the fortuitous factor of the judgment of the finder of fact which hears each case. Compare *United States* v. *Crawford Packing Co., supra,* with *Jackson* v. *Phinney, supra.*

Just as important, the decisions of the Court of Claims and the First Circuit show that results will differ in different parts of the nation even though the owners, their captains, and the crews are involved in virtually identical commercial undertakings.

Further, the Social Security Administration, in paying social security benefits, is faced with a most

difficult situation. It must have a consistent nationwide policy. The geographic location of an applicant or his work cannot be a basis for denying benefits. Nor can the results of cases such as this, to which only the boat owner is a party, bind the captains or crews.

Thus, the agency had to make a decision of whether to deny benefits to all fishermen or to give such benefits to the entire class. The agency has resolved this dilemma by paying the entire class of workers the benefits regardless of the geographic area in which they perform their services. As a result, some people now receive benefits free of any corresponding burden on them or on the owners of the boats on which they have worked. This, to be sure, does not impose a dangerous financial burden on the Social Security System. But it does, in relation to the hundreds of owners and fishermen involved, impose an inequity that presently may be resolved only through review by this Court.[5]

[5] In 1967, the Treasury Department proposed to Congress that the definition of the term "employee" contained in Section 3121(d) be amended to include expressly captains and crewmen of commercial fishing vessels. See the proposed Social Security Amendments of 1967, H.R. 12080, as amended by the Senate, Section 504(b)(1)(2), 90th Congress, 1st Sess. It was favorably reported out of the Senate Finance Committee. S. Rep. No. 744, 90th Cong., 1st Sess., p. 320. The bill was referred to the Conference Committee which reported that the Senate receded from its amendment. Conf. Rep. No. 1030, 90th Cong., 1st Sess., p. 74.

No reason is given for the action of the Conference Committee. All that is known is that Congress did not pass a statutory provision which would have resolved the problem in this case. But the problem still remains, and the failure of Congress to act may as well be taken as approval of the decisions of the Court of Claims and the First Circuit as expressing a conclusion to the contrary. Cf. App. A, p. 7a and nn. 5, 6.

The course of decision in the Fifth Circuit poses a similar administrative dilemma for the Internal Revenue Service. The need for a judicial resolution on a case by case basis has already produced a large amount of litigation. At the close of the calendar year 1968, 56 cases involving 223 taxpayers engaged in fishing operations were pending in the district courts of the Fifth Circuit. During that year, the government settled another 26 cases involving 128 taxpayers. These figures do not present the entire problem, for there are a large number of other individuals engaged in seafaring operations in the Fifth Circuit, and they either are not paying social security taxes or have not yet brought suit.

So long as the decision in this case stands, the government is left with no alternative except to litigate each of these cases to a finder of fact, or to settle all of them. The latter course is the only one that would result in any uniformity of application of the statute among numerous taxpayers similarly situated. Even then, the uniformity would be restricted to the Fifth Circuit, since it is clear that the government must continue to insist on the payment of these taxes by fishing boat owners outside the Fifth Circuit unless and until there is a contrary decision by this Court.

Furthermore, there is every reason to believe that the rule in this case will be extended to other businesses. An example is provided by the cases of *Marathon Seafoods, Inc.* v. *United States,* Docket No. 63–503, S.D. Fla., and *Pinellas Seafood, Inc.* v. *Tomlinson,*

Docket No. 64–449, S.D. Fla. Each case involved "shrimpheaders"—persons whose job it was, in a land based factory, to cut the heads off shrimp prior to commercial distribution. Each taxpayer operated a shrimp processing plant along Route 1 on Key Marathon in Florida. Indeed the taxpayers are situated side-by-side on the same road and there were no differences in the relationship between owners and workers. Nevertheless the finders of fact reached opposing conclusions, finding for the government in the first case and for the taxpayer in the second.

Nothing in *Silk* v. *United States, supra* and *Bartels* v. *Birmingham, supra* makes either of those cases a more appropriate subject for review in an appellate tribunal than this case. Presumably, therefore, situations such as existed in those cases are now committed to the final decision of the finder of fact within the Fifth Circuit, without appellate review of the nature that this Court in fact gave in those cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ERWIN N. GRISWOLD,
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MARCH 1969.

APPENDIX A

In the United States Court of Appeals for the Fifth Circuit

No. 25674

UNITED STATES OF AMERICA, APPELLANT

v.

W. M. WEBB, INCORPORATED, ET AL., APPELLEES

Appeals from the United States District Court for the Eastern District of Louisiana

(November 6, 1968)

Before COLEMAN and MORGAN, Circuit Judges, and HUNTER, District Judge

HUNTER, *District Judge*: These tax refund cases involve similar questions of law and fact, and were consolidated by agreement of the parties. The sole question presented is whether fishermen (captains and crews) operating menhaden fishing boats owned by the taxpayers, were their employees for purposes of the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA) within the meaning of Sections 3121, et seq., and 3306, et seq., of the Internal Revenue Code of 1954; 26 U.S.C.A. § 3121 et seq., and 3306 et seq. The district court, after a full trial, entered its findings of fact and conclusions of law. It concluded that for the purposes of the two Acts the fishermen were not employees of the taxpayers. The Government appeals and raises two speci-

fications of error: First, that the district court erred in ignoring principles of general maritime law in its evaluation of the relationshp between the taxpayers and the fishermen. The second error asserted that even in the absence of the principles of general maritime law, this record establishes as a matter of law that the captains and crews were employees of the respective taxpayers.

All agree that both Acts impose taxes upon employers measured by the compensation paid to employees, and as defined by the statutes for our purposes is the same. Section 3121(d) reads in pertinent part:

> The term "employee" means—
> (1) any officer of a corporation; or
> (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or * * *[1]

and Section 3306(i) reads:

> The term "employee" includes an officer of a corporation, but such term does not include (1) any individual who, under the usual common-law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common-law rules.

The present definitions of the term "employee" have a common genesis. The Supreme Court in 1947, because of a lack of decisional uniformity in defining "em-

[1] "Succeeding subsections specifically include in the category of employees persons engaged in a number of quite irrelevant occupations such as agent or commission drivers distributing specified products, full time life insurance salesmen, certain home workers and traveling salesmen." *United States* v. *Thornson*, 282 F. 2d 157, 158, ftn. 1 (C.A.-1, 1960). Fishermen were not included in this group.

ployee" under the Social Security Act, decided the cases of *United States* v. *Silk*, 331 U.S. 704; and *Bartels* v. *Birmingham*, 332 U.S. 126, therein setting forth broad general guidelines to courts and agencies. As a consequence of these decisions, the Treasury Department proposed a new regulation defining the employer-employee relationship on the basis of an economic reality test. This proposed regulation caused considerable criticism in Congress and led to enactment in June, 1948, of J.H. Resolution 296 (62 Stat. 438) over President Truman's veto. The legislative history of this resolution makes it clear that the Congress meant to and did emphatically reject the economic reality test proposed by the Treasury Department, but did *lend* its approval of the Supreme Court decisions as they were interpreted by the Senate Committee.[2] Thereafter, amendments were enacted which redefined the term "employee." These amendments have been carried over into the Revenue Code of 1954 as heretofore quoted.[3] This common-law concept is described in the current Treasury Regulations on Employment Tax (1954) Code, Section 31.3121(d) 1(c):

---

[2] "In view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an 'employee' for purposes of applying the Social Security Act. And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act." (2 U.S.C. Cong. Serv. (1948), p. 1785.)

[3] The legislative history of the amendments was considered by this Court in *United States* v. *Crawford Packing Company*, 330 F. 2d 194, 195 (1964), and by other courts in various cases including *United States* v. *Thorson*, 282 F. 2d 157, 159 (C.A. 1st, 1960); *Ringling Bros. Barnum & Bailey Com. Shows* v. *Higgins*, 189 F. 2d 865, 869 (C.A. 2d, 1951); *Party Cab Co.* v. *United States*, 171 F. 2d 87, 89–91 (C.A. 7th, 1949); and *Hoosier Home Improvement Co.* v. *United States*, 350 F. 2d 640 (C.A. 7th, 1965).

§ 31.3121(d)–1 *Who are employees.*
* * *

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

Against this background the record here shows that the appellee-taxpayers, owners of menhaden fishing boats contracted verbally with captains, selected by them, to catch menhaden fish. The owners relinquished control of the boats to the captains who staffed and provisioned them as they saw fit without interference from the owners. The captains agreed, without a guarantee of earnings of any kind, to make fishing trips for a season and to return the catches to a plant designated by the owners. The boat owners paid the captains an agreed price for each 1,000 fish caught and delivered. In addition to the price paid per 1,000 fish unit, taxpayers also paid the captains an additional amount per unit as a "bonus." Payments were made to the crew in such amounts as the crewmen and captain negotiated, based on the number of units of fish the crewmen helped to catch. The district judge concluded that the degree of control was not such as to create the relationship of employer-employee between the owners and the captains and crewmen.

The Government suggests that we promulgate a new test in this area by applying principles of General Maritime Law in the determination of whether the captains and crews were the employees of the respective taxpayers, and alternatively, argues that even in the absence of General Maritime Law principles, the record here conclusively establishes that under the traditional "common law test" included in the regulations, the captains and crews were employees of taxpayers.

Does a realistic application of common law tests require the relationship of the owners to the captains and crews be evaluated under principles of general maritime law? The "ancient solicitude of courts of Admiralty for those who labor at sea continues unchanged, despite the progress from canvas sails to diesel engines."[4] In non-tax context when courts are asked to determine whether seamen are employees of the vessel's owner, all ambiguities or doubts are resolved in favor of the seamen. Today, the law is clear that in both categories of cases—Jones Act, and maintenance and cure—the owner of the vessel is the employer unless the vessel is held under a demise charter. The arrangements here certainly did not constitute demise charters. If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court. This is so because it is clear that under maritime law the captain is the agent of the owner (on the facts here) and the crew hands are employees.

However, the first matter to consider in any tax case is: What are the words of the statute? The words of the statute here are clear and explicit. The determination of the relationship is to be made on the basis of common law tests. It seems questionable, at best, whether Congress, in re-affirming the use of the common law test, intended thereby to incorporate maritime law under the FICA and FUTA. Moreover, maritime law was urged as a controlling factor by the Government in *United States* v. *Crawford Packing Company* (supra). There, the proposition was extensively briefed and argued to this Court, which sustained the trial court's findings and conclusions in *Crawford,* and sub silentio rejected the government's

[4] *Hudspeth* v. *Atlantic and Gulf Stevedores, Inc.*, 266 F. Supp. 937.

maritime-oriented definition of "employee" for tax purposes. We note that in 1967 the Treasury Department unsuccessfully proposed to Congress that the definition of "employee" under 3121(d), Internal Revenue Code, be amended to include all captains and crewmen of commercial fishing boats, with the exception of fishermen who chartered boats from owners, who, in turn, had no interest in the catch.[5] Had the Treasury's proposal been accepted, it would have mooted the issue in this case. The Committee's rejection of the proposal indicates to us Congress's intention to retain the common law control test as the sole test for defining "employee" for tax purposes, whether they be maritime personnel or other types of employees.[6]

Questions of maritime law aside, the Government presses with vigor the argument that the facts here

[5] Social Security Amendments of 1967, H.R. 12080, as amended by the Senate, Section 504(b)(1)(2), 90th Congress, 1st Session. It was reported out of the Senate Finance Committee, Sen. Rept. No. 744 on November 14, 1967, 90th Cong. 1st Sess., p. 320, stating that the proposed amendment "identifies captains and crew members of fishing vessels as employees for purposes of Title II of the Social Security Act * * * irrespective of the common law status of these persons. The amendment thus makes it unnecessary to determine the status of these persons under the common law rules applicable to an employer-employee relationship."

[6] The bill (H.R. 12080) was referred to a committee of conference, Conference Rept. No. 1030, Dec. 11, 1967, 90th Cong., 1st Sess. The Report, at p. 74, disclosed that "The Senate recedes" with respect to its amendment of Section 3121(d), Internal Revenue Code. It is interesting to note that H.R. 12080, as passed by the House of Representatives, proposed various amendments to sections of the Internal Revenue Code, but no attempt was made by the House of Representatives to alter the definition of "employee" in Section 3121(d), nor was the status of fishermen mentioned. House Rept. No. 544, August 7, 1967, 90th Cong., 1st Sess. p. 144.

are such as to preclude the decision of the district court. The district court delineated with some elaboration the relationship between the owners and the captains and crewmen. We refer to the findings of that court which makes it unnecessary for us to state the facts in detail. *Webb, Inc., et al* v. *United States,* 271 F. Supp. 249. Here, as in *Crawford,* there is no difficulty in stating that the question of status is to be determined under common law rules. This case is difficult, as have been others like it of recent vintage. The following decisions in this circuit, on facts substantially similar to those in this case, have concluded that the workers and captains were not employees within the meaning of the two acts: *Crawford Packing Company* v. *United States,* 228 F. Supp. 549, aff'd 330 F. 2d 194 (5th Cir., 1964); *Star Fish and Oyster Company* v. *United States,* 223 F. Supp. 402 (S.D. Ala., 1963); *Williams Packing and Navigation Company* v. *Enocks,* 176 F. Supp. 168 (S.D. Miss., 1958), aff'd 291 F. 2d 402 (5th Cir., 1961), reversed on jurisdictional grounds, 307 U.S. 1; *Williams Packing Company* v. *United States,* Civil Action No. 2631 (S.D. Miss., 1964); *Sea Garden Corporation, et al* v. *United States,* No. 64–9–Cir–J (M.D. Fla., 1965); *Gulf Boats, Inc.* v. *United States,* No. 2368 (S.D. Miss., 1962). On the other hand, courts have concluded, also on facts close to this case, that the captains and deck hands were employees. *Jackson* v. *Phinney,* 266 F. Supp. 835 (W.D. Tex., 1967); *Kirkconnell* v. *United States,* 347 F. 2d. 260 (Ct. of Claims, 1965); *Cape Shore Fishing Company* v. *United States,* 330 F. 2d 961 (Ct. of Claims, 1964); *Capital Trawlers, Inc.* v. *United States,* 324 F. 2d 506 (1st Cir., 1963). The excellent briefs point to many cases, but these suffice to reveal the diversity of thinking. There is a hankering for something definite and absolute, but the jurispru-

dence teaches us that there is no perfect and unchanging formula.

The Government's argument that a pure question of law is presented here does not conform to the weight of authority. Under the rule of *Commissioner* v. *Duberstein*, 363 U.S. 278 (1960), a tax case, a reviewing court must affirm the district court unless it can be said that its basic findings were clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure. We find that here there is ample evidence to support the finding of the district court. It might have found otherwise on the evidence adduced, but since we cannot say that those which were made were "clearly erroneous," we accept them under the mandate of Rule 52(a), F.R.C.P. Accepting these findings, the ultimate conclusion that the captains and crewmen were not employees necessarily follows. *United States* v. *Crawford Packing Company* (5th Cir., 1964), 330 F. 2d 194. The judgments for the taxpayers are affirmed.[1]

[1] The average crew consisted of 24 men. Each captain selected his own crew and controlled them. The question of whether or not the crew members were "employees" of the captain for the purposes of Federal Insurance Contributions Act taxes and Federal Unemployment Act taxes is not before us.

APPENDIX B

United States Court of Appeals for the Fifth Circuit

October Term, 1968

No. 25674

D.C. Docket Nos. CA 15170, 15171, 15172, 15215 and 15216

UNITED STATES OF AMERICA, APPELLANT

v.

W. M. WEBB, INCORPORATED, ET AL., APPELLEES

Appeals from the United States District Court for the Eastern District of Louisiana

Before COLEMAN and MORGAN, Circuit Judges, and HUNTER, District Judge

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Eastern District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of the said District Court in this cause be, and the same are hereby, affirmed;

It is further ordered and adjudged that the appellant, United States of America, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

NOVEMBER 6, 1968.

Issued as Mandate: November 20, 1968.

APPENDIX C

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 3111. RATE OF TAX.

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages paid during the calendar years 1955 to 1959, both inclusive, the rate shall be 2 percent;

* * * * *

(26 U.S.C. 3111.)

SEC. 3121. DEFINITIONS.

(a) *Wages.*—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

(d) *Employee.*—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the

employer- employee relationship, has the status of an employee; or

* * * * *

(26 U.S.C. 3121.)

SEC. 3301. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1961 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.1 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)) after December 31, 1938.

* * * * *

(26 U.S.C. 3301.)

SEC. 3306 [as amended by Sec. 1, Act of September 1, 1954, c. 1212, 68 Stat. 1130]. DEFINITIONS.

(a) *Employer.*—For purposes of this chapter, the term "employer" does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was 4 or more.

(b) *Wages.*—For purposes of this chapter, the term "wages means all remuneration for employment, including the cash value of al remuneration paid in any medium other than cash; * * *

* * * * *

(c) *Employment.*—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939

under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * * *

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except—

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States).

* * * * *

(i) *Employee.*—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a

corporation) who is not an employee under such common law rules.

* * * * *

(26 U.S.C. 1964 ed., Sec. 3306.)

Treasury Regulations on Employment Tax (1954 Code):

§ 31.3121(a)–1 WAGES.

* * * * *

(b) The term "wages" means all remuneration for employment unless specifically excepted under section 3121 (a) (see §§ 31.3121 (a) (1)–1 to 31.3121 (a) (10)–1, inclusive) or paragraph (j) of this section.

(c) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are wages if paid as compensation for employment.

(d) Generally the basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually. See, however, § 31.3121 (a) (8)–1 which relates to the treatment of cash remuneration computed on a time basis for agricultural labor.

* * * * *

(26 C.F.R. 31.3121(a)–1.)

§ 31.3121(d)–1 WHO ARE EMPLOYEES.

* * * * *

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to

the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

* * * * *

(26 C.F.R. 31.3121(d)–1.)

§ 31.3306(b)–1 WAGES.

* * * * *

(d) The basis upon which the remuneration is paid is immaterial in determining

whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually.

* * * * *

(26 C.F.R. 31.3306(b)-1.)

§ 31.3306(i)-1 WHO ARE EMPLOYEES.

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of § 31.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services

as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

* * * * *

(26 C.F.R. 31.3306(i)–1.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

THE UNITED STATES OF AMERICA

vs.

W. M. WEBB, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 1124

THE UNITED STATES OF AMERICA

vs.

W. M. WEBB, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The findings of fact and conclusions of law of the district court (R. 218-241) were officially reported at 271 F. Supp. 249. The opinion of the Court of Appeals for the Fifth Circuit below (Pet. App. A, 1a-9a) is reported at 402 F.2d 956.

JURISDICTION

The jurisdictional prerequisites are adequately set forth in the petition. Time for filing the response was extended by the Clerk of the Court to April 14, 1969.

QUESTION PRESENTED

The sole question presented is whether fishermen (captains and crewmen) operating menhaden fishing boats owned by the respondents were their "employees" as that term is defined in the Federal Insurance Contributions Act (FICA) and the Federal Unemployment Tax Act (FUTA), Sections 3121 et seq. and 3306 et seq. of the Internal Revenue Code of 1954; 26 USCA §§ 3121 et seq. and 3306 et seq.

STATUTES AND REGULATIONS INVOLVED

The specific statutes involved are §§ 3121(d) and 3306 (i), Internal Revenue Code of 1954; 26 USCA §§ 3121(d) and 3306(i), and the interpretive regulations, 26 CFR § 31.3121(d)-1 and § 31.3306(i)-1. They are set forth in the Appendix, *infra*, pp. 20-22.

STATEMENT

The importance of the facts to the decision requires a full summary of the district court's findings of fact. (R. 219-238) Petitioner's statement of the case ignored a number of the district court's special findings, necessary to its conclusions, and distorted others.[1] Adding to those already stated (Pet. 2-6), the following are considered pertinent:

The business of each respondent embraced: (1) owner-

[1] A material distortion in petitioner's statement is embraced in the words (Pet. 4): "The captain could be fired if he failed to follow a respondent's instructions (R. 224)." We have searched the district court's findings and petitioner's record reference to no avail. We think this statement exceeds the reasonable bounds of inference and the outer limits of editorial license. It is a bald and transparent attempt to inject elements of control into the court's findings which do not exist. The contrary was evident. See, R. 237, Fdg. 47. The petitioner's record reference ("R. 224)" at (Pet. 4) to the nonexistent language is a callous disregard for material matters basic to the resolution of questions raised by the petition.

ship of one or more menhaden fishing boats; (2) the fishing for menhaden under contractual arrangements with certain captains and (3) the processing of the fish into fish meal products for sale on the open market. (R. 221; Fdg. 7)

The employment tax effect of the contractual arrangement between each respondent and the fishermen (captains and crewmen) was the sole question for determination below. (R. 219) While not formalized by the parties and designated as such, the district court found that the arrangement between them constituted an oral contract. (R. 224; Fdg. 15). To this end, respondents relinquished control of their fishing boats for a season [2] to captains who provisioned them at their own expense as they saw fit and staffed them with crews selected without interference by the respondents. (R. 221, 227, 231; Fdgs. 8, 22, 34) Further, it was the exclusive prerogative of the captains to conduct the fishing operations, actually and entirely, by their own means and methods without interference by the respondents and without a guarantee of compensation of any kind. (R. 221, 224, 228; Fdgs. 8, 15, 25, 31) Unless fish were caught, the fishermen had no earnings. (R. 230, Fdg. 31)

The general area to be fished (the Gulf of Mexico or Atlantic Ocean) was determined by the seasonal presence and availability of the menhaden fish. When a choice of two places to fish occurred, the captain's preference was a factor in a joint decision with the respondent. (R. 225, Fdg. 17) By their own choice the captains fished either the Gulf of Mexico or the Atlantic Ocean. Some fished in both areas for consecutive seasons in a single year. Some captains contracted for a single season for a single year. Others fished a single season for respondents and at other times for competitors without any pattern of continuity

[2] A fishing season lasted anywhere from three to seven months depending upon the area fished. (R. 224, 225; Fdgs. 13, 16).

of relationship with the respondents. (R. 225, 226; Fdg. 18) Payment was made by respondents to captains at an agreed rate per unit, i.e. each "1000-fish" caught and delivered. (R. 230, Fdg. 30)

The commencement and termination of each season was considered a separate and complete undertaking by the captains and respondents. New negotiations between the parties respecting prices per "1,000 fish" and arrangements for staffing and provisioning of the boats were commenced with each separate season. There was no pattern of continuity in the service relationship beyond the short seasonal fishing period, each of which inaugurated a new set of fiscal and personnel records between the fishermen and respondents. (R. 226-227, 230; Fdgs. 19, 20, 32)

While respondents determined that a crew of 24 men was necessary for successful fishing (Pet. 4), additional persons could be hired in the captains' discretion who, in turn, bore the burden of the extra expense. Fewer than 24 men were not shipped by a captain without first consulting a respondent. (R. 227; Fdgs. 21, 22) Although respondents furnished the captains with seasonal pay scales for crew members (Pet. 4), each captain was privileged to increase the amount paid the crewmen, but, again, he assumed the burden of the extra expense without reimbursement by the respondent. (R. 228; Fdgs. 23, 24)

Although it was in the interest of the parties to fish the boats as often as practicable, whether a boat remained in port due to unseaworthiness or bad weather were considerations left solely to the discretion of the captain, as opposed to the respondents. (R. 234; Fdg. 40) A captain used the radio communications facilities aboard the boat as he deemed necessary, without interference by the respondent and freely accepted or rejected the services of fish spotter airplanes provided by the processing plants. (R. 236-237; Fdg. 45) Although the arrangements described could be terminated voluntarily or involuntarily

by either party at the end of any trip (Pet. 3), the captains did not leave their boats prior to the season's end. There was no evidence of termination of any relationship or contract during a season. (R. 237; Fdg. 47)

The district court further found that, (1) there was no express agreement specifying the extent to which respondents had control over the fishing activities of the captains and it was clear that no actual control was exercised over the details, manner or method employed by the captains and their crews. (R. 236; Fdg. 44); (2) that respondents had no agreement with the captains that entitled them to a preferred call on all the time and services of the captains (R. 237; Fdg. 48); and (3) that respondents had no actual control over the crewmen, nor did they exercise any control over the latter's activities through the captains. (R. 238; Fdg. 49)

In applying the common law test of the employer-employee relationship, it was open to the district court to hold that for purposes of §§ 3121(d) and 3306(i), the fishermen were employees of the respondents. But it was obvious from its findings of fact that the district court had the common-law control test clearly in mind. (R. 236, 237, 238; Fdgs. 44, 46, 48 and 49) And the Circuit Court below affirmed, noting that there was ample evidence in the record to support the district court's findings. (Pet. App. A, p. 9a)

REASONS FOR DENYING THE WRIT

Argument

I. Petitioner's contentions that different approaches exist between the Fifth Circuit opinion below (Pet. App. A, p. 1a), the Court of Claims[3] and the First Circuit[4]

[3] *Cape Shore Fish Co.* v. *United States*, 330 F.2d 961, and *Kirkconnell* v. *United States*, 347 F.2d 260.

[4] *Capital Trawlers, Inc., et al* v. *United States*, 324 F.2d 506, aff'g., *per curiam*, 216 F. Supp. 440.

(Pet. 6-7) respecting the issue involved here will not withstand analysis.

Petitioner concedes that the common law test determining who are employees, provided in §§ 3121(d) and 3306 (i), Title 26, United States Code, was applied to all the cases claimed differently approached. (Pet. 2, "question presented", 10-11, 12) It clearly appears therefore, that the asserted conflict in "approaches" arises from differences in states of fact, or from different inferences drawn from similar facts and not in varied applications of a principle of law. In these circumstances the writ should not be granted.[5]

Petitioner forcefully argues that a complete identity of circumstances, without important factual differences, exists among the cases cited (Pet. 7, 10) and a rule of law should be fashioned by this Court, under its supervisory powers, to govern lower court decisions respecting tax incidence growing out of service relationships in the fishing industry. (Pet. 6, 9, 10) A casual reading of the petitioner's authorities cited for comparison[6] (Pet. 7) discloses material differences from those at bar.

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[5] *Wisconsin Electrical Co.* v. *Dunmore*, 282 U.S. 813.

[6] Material departures in petitioner's citations from the case at bar are:

Cape Shore Fish Co. v. *United States, supra;* the service relationship was governed by a union contract which materially controlled the captain's hiring practices, curtailed his freedom of boat operations as to time of departure, arrival and the fixing of working hours and watches at sea for the crew; payments were guaranteed following "brokers", and patterns of long and continued relationships were evident in a general atmosphere of supervision of the captains under sanctions for failure to follow the owner's instructions.

Capital Trawlers, Inc., et al v. *United States, supra;* the arrangement provided for guaranteed payments following a "broker", patterns of continuity of service relationships for extended periods and control by the owner over details of the fishing operations, including staffing and provisioning of the boats.

[Footnote continued on page 7]

But assuming, *arguendo*, that the facts were not materially different, as alleged, the rule is that where the jury has tried the matter upon instructions, the only inquiry is whether it cannot be said that reasonable men could reach differing conclusions on the issue. Where, as here, the trial has been by the judge without a jury, the judge's findings must stand, unless "clearly erroneous." F.R.Civ.P. 52(a), 28 USCA. These rules will on many occasions be presented in cases deciding service relationships, not alone in the fishing industry, but any industry. And, as observed by the Circuit Court below (Pet. App. A, p. 3a), Congress having been explicit when it amended Sections 3121(d) and 3306(i), Internal Revenue Code, that the common-law standards alone should be applied, anticipated a variance in results by triers of the facts.[7]

The facts stressed by petitioner indicated at most that the question of the fishermen's status was a debateable one, that is, one upon which reasonable men may differ. *Baker* v. *Texas & Pacific Ry. Co.*, 359 U.S. 227, 228. It was open to the fact finder to reach a contrary result but the respondents prevailed. Decisions in close cases are a familiar litigation casualty to which the government is no more immune than taxpayers.

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[6] [Continued]

Kirkconnell, et al v. *United States, supra;* a union contract permeated the service relationship, creating an atmosphere of tight control by the owner over the captains including crew hire and permanency of relationship. The Court of Claims called this a "very close case." (*id.* 347 F.2d at p. 267) All three cases contained language distinguishing their facts from those in Fifth Circuit cases cited reaching contrary results.

[7] "Thus the inquiry when proceeding under the usual common-law rules, realistically applied, has a clearly focused and practical end point. A whole field of pertinent fact, documentary and otherwise, is available to cast its weight one way or the other. Commonsense and our own experience tell us that the rule so applied will work a reasonable sifting of difficult cases." Sen. Rept. No. 1255, 80th Cong. 2d. Sess., p. 10; 2 U.S. Code Cong. Serv., 1948, at p. 1762.

It is not in harmony with sound practice considering the nature of this Court's function and those of the district courts for the Supreme Court to undertake drawing the final conclusion generally in these border-line cases. Having declared the principles of law in *Enochs* v. *Williams Packing and Navigation Co.*, 370 U.S. 1 (discussed, *infra*, p. 10) to be applied in these boatowner-fishermen cases, the function of this Court is sufficiently discharged by seeing to it that they are observed. When this has been done, drawing the final conclusion in matters so largely factual as the end result must be in close cases, it is more properly the business of the district courts than this Court.

II. Alternatively, petitioner argues that the holdings in the case below and similar cases were not resolutions of fact issues at all, but were ultimate conclusions based on undisputed facts, representing pure questions of law which are subject to plenary review on appeal. (Pet. 9) Citing *United States* v. *Silk*, 331 U.S. 704 and *Bartels* v. *Birmingham*, 332 U.S. 126 (Pet. 9, 11) for support, petitioner not only misread those cases but ignored the rules basic to issuing a writ of certiorari.

The writ was granted in those cases in 1947 because the federal courts were applying varying standards when determining who were employees under the Act. This Court observed in *Silk* (*id.* 331 U.S. at 711): "No definition of employer or employee applicable to these cases occurs in the Act. * * * Nothing that is helpful in determining the scope of the coverage of the tax sections of the Social Security Act has come to our attention in the legislative history of the passage of the Act or amendments thereto."

But, as petitioner says, in 1948 Congress passed clarifying legislation defining the term "employee". (Pet. 10-11) There could be no mistake that the common law standards and those alone were to be applied. The text

is contained in the petition, App. A, at 2a, 4a and in the Appendix *infra*, pp. 20-22.

Although the moving principles in *Silk* and *Bartels* were consistent with the common law rules, the Committee Reports leading to the amendments emphatically rejected and overrode the liberalized "economic reality test" suggested by this Court in prefatory remarks in *Silk*,[8] and as *dictum* in *Bartels*,[9] which led to a new regulation proposed by the Treasury Department for deciding employee status.[10] (Pet. App. A. p. 3a) Thus Congressional enactment removed the uncertainty of definition as to who were "employees" under the Social Security Act. No serious question of construction of a statute of nationwide importance remains, nor does petitioner present an issue of clarity.

Petitioner would equate Congress' desire for "nationwide uniformity of application of the act" (Pet. 11) with some litmus paper test for deciding who are employees under the common-law rules. Even the Treasury Department in the text of its implementing regulations,[11] approved by the Congress as the test to be applied, realized that the diverse blends of personal relationships in

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[8] 331 U.S. 704 at 713.

[9] 332 U.S. 126 at 130.

[10] "But, we repeat, if it be argued that the Supreme Court decisions establish a new definition of 'employee', then it is the purpose of this resolution to reestablish its meaning according to the usual common law rules, realistically applied." Senate Rept. No. 1255, 80th Cong. 2d Sess. p. 7; 2 U.S. Code Cong. Serv. (1948) at p. 1758.

[11] See, 26 CFR §§ 31.3121(d)-1 Who are employees.

* * * *

(c) Common law employees. * * *

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

our industrial society present niceties for ajudication which can not be put to rest by any kind of general formulation. In situations so dependent upon the inferences drawn from the facts in each case, the desired uniformity of decision urged by the petitioner can be achieved only by the application of appropriate legal rules, whether by the judge as the trier of facts or the jury under appropriate instructions.

The Committee Report leading to amendments of §§ 3121(d) and 3306(i) contained a chapter titled: Uniformity of Application of the Act Promoted by Supreme Court Decisions Applying the Existing Regulation." The text following said in substance that the existing Treasury Regulations "provide the answer to the Federal Security Agency for a rule of common application promotive of more uniform coverage of the act * * *" and encouraged its continued application rather than invite changes which would give "rise to new uncertainties, more varied interpretations, a larger area for litigation, greater diversity of judicial decisions." (Senate Rept. No. 1255, 80th Cong. 2nd Sess. at p. 18; 2 U.S. Code Cong. & Admin. News (1948) at p. 1769.)

The notion that "employee" status under §§ 3121(d) and 3306(i) is a question of law runs counter to this Court's decision in *Enochs* v. *Williams Packing and Navigation Co.*, 370 U.S. 1, holding the employment status of fishermen for social security tax purposes is a question of fact.[12] The *Enochs* v. *Williams* decision was based on jurisdictional grounds not here applicable and discussed the merits only for the purpose of determining "whether the government has a chance of ultimately prevailing."

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[12] "These sections specifically adopt the common law test for ascertaining the existence of the employer-employee relationship. As stated in *United States* v. *Silk*, 331 U.S. 704, 716, 'degrees of control, opportunities for profit or loss, investment in the facilities, permanency of the relation and skill required . . . . are important for decision [under the statutes]'." (370 U.S. at 3)

On that record it held: "The record before us clearly reveals that the government's claim for liability was not without foundation." (370 U.S. at 8) Also, the government's petition for a writ of certiorari in *Williams, supra*, successfully argued, "The record and issues in the present case pose questions of law and fact * * * which are subject to reasonable disagreement * * *." Likewise, the government's brief on the merits in *Williams* took considerable comfort in the Circuit Court's dissenting opinion which described the issue, deemed controlling by the majority, as "closely and hotly litigated purely as a question of fact." See, Vol. 132 of the Supreme Court Records and Briefs, Oct. Term 1961, No. 493, Petition at p. 7, and petitioner's Brief at pp. 23-24.

Unsuccessful taxpayers appealing adverse verdicts in employment tax cases respecting other relationships[13] have urged reversal, contending that the issue was one of law for the Court and should not have been submitted to the jury. The government opposed, arguing that conflicting inferences deducible from the facts were properly jury questions. The reviewing courts affirmed in each instance. Thus, petitioner would require the respondents plead in vain the very contentions urged so successfully by the government.

The opinion below at most presents a unique set of facts not likely to recur. Respondents pray the Court to accept the concurring opinions of two courts below. We believe the Circuit Court's decision below is not one that will have importance beyond the particular facts and parties involved, nor is it in conflict with the applicable decisions of this Court. The petition for the writ should be denied.

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[13] *Lifetime Siding Co.* v. *United States*, 359 F.2d 657 (CA-2), cert. denied 385 U.S. 921 (siding applicators);

Service Trucking Co. v. *United States*, 347 F.2d 671 (CA-4) (truck unloaders);

Hoosier Home Improvement Co. v. *United States*, 350 F.2d 640 (CA-7) (window installers).

III. Petitioner's third ground, hardly a model of clarity, has two features: *First*, that the decisions in the Court of Claims and the Fifth Circuit give opposing constructions to the term "common law rules" in § 3121(d), which should be resolved by this Court; (Pet. 12, 15) and *Second*, as we understand it, petitioner says that respondents are liable for FICA and FUTA taxes on the earnings of fishermen even though they are not employees under the common-law standards prescribed by §§ 3121(d) and 3306(i), Internal Revenue Code, so long as the respondents, as owners of the boats, are liable to the fishermen for maintenance and cure under maritime law. (Pet. 13, 14, 14) The contentions are indefensible. We take them in order.

First, there is no conflict between the Court of Claims in *Cape Shore Fish Co.* and the Fifth Circuit decisions cited.[14] They are in full accord. As did the Fifth Circuit, the Court of Claims in *Cape Shore* applied the common-law standards in the statutes and Treasury Regulations involved to the facts adduced. (330 F.2d at 962, 964-5) *Cape Shore* listed as controlling (*id.* at 965) this Court's decision in *Enochs* v. *Williams Packing Co., supra*, which settled the question, saying: "These sections specifically adopt the common-law test for ascertaining the existence of the employer-employee relationship." (370 U.S. at 3) Petitioner's asserted conflict became self-defeating when the Court of Claims itself, in *Cape Shore*, distinguished the contrary results reached by the Fifth Circuit in *Crawford Packing Co.*, stating: "The facts in *Crawford Packing* differed in material respects from the facts here." (330 F.2d at 973; ftn. 18)

Petitioner observed that the "Court of Claims examined the maritime cases in detail and relied for its conclusion on the fact that under maritime law the arrangements in that case would not have sufficed to relieve the

[14] *United States* v. *Crawford Packing Co.*, 330 F.2d 194 (Pet. 6, 8, 10, 12) and the opinion below at Pet. App. A, 1a et seq.

boat owner of the employer's traditional obligations to his seamen." (Pet. 14) The observations are beside the point. A boat owner's obligations for maintenance and cure have no relation to his tax liabilities on the seamen's earnings under FICA and FUTA. Each obligation and liability is governed by different acts having different legislative purposes. Maintenance and cure is a fact of the seaman's attachment to the boat which creates the right and not the form of the contract with the owner. A term in a contract under which a seaman purported to waive the right would be unquestionably void. Gilmore & Black, *The Law of Admiralty*, 1957 ed. p. 257. "Employees" defined under the FICA and FUTA statutes are specifically described and their identity for tax purposes is finely drawn. On the other hand, the term "employee" in maritime law is left at large, without definition to give effect to the ameliorating purposes of maritime law which recognizes the cost and debilitating effect of industrial injury. That the fishermen here are not employees in the common law sense is no bar to their rights and protection as wards of the admiralty court under maritime law. This Court said in *Hopson* v. *Texaco Co.*, 383 U.S. 262 at 263-4, that the application of the Jones Act, an extension of the maritime law, was "an avowed departure from the rules of the common law * * *."

Suffice it to say here that the Court of Claims' discussion of maritime cases was *obiter dicta*, having only historical significance. It is noteworthy that in *Kirkconnell* v. *United States*, *supra*, decided after *Cape Shore*, the Court of Claims reached a similar result, but made no mention of maritime law as a basis for conclusion that the fishermen were employees. Applying solely §§ 3121(d), 3306(i) and the Regulations in *Kirkconnell*, the Court of Claims again distinguished the contrary results reached by the Fifth Circuit and added that it was a "very close case". (347 F.2d at 265, 267) It seem strange indeed that petitioner's authorities, i.e., *Kirkconnell* in the Court

of Claims and *Capital Trawlers* in the First Circuit, cited earlier in the petition (Pet. 7) to support its transparent assertions of conflict have not been summoned here to lend aid and comfort to petitioner's maritime-oriented employee argument.[15]

All that remains is a *dictum* from a single case which was later disowned by the same Court of Claims that spawned it. Numerous cases deciding the same tax issue, applying the same rules of law made no reference to principles of maritime law. The *dictum* in *Cape Shore* has authority only in the government's petition.

The *second* feature of petitioner's ground suggests that in seafaring arrangements boatowners are liable for FICA and FUTA taxes on the earnings by seamen by virtue of the former's obligation to the latter for maintenance and cure, irrespective of the true service relationship stemming from the contract between them. (Pet. 13, 14, 15) On its face the contention is unsound. As we said, the clear differences between the term "employee" specifically defined and circumscribed under the common law tests outlined by the tax statute on the one hand, and the term "employee" under maritime law which is without definition on the other, should conclude the matter. Petitioner thus puts forth a contention which not only ignores basic concepts in admiralty and maritime jurisprudence, but also ignores elementary principles of statutory construction. Their exposition is out of place in these limited proceedings. Suffice it to say that this Court pointed the way in an analogous situation, a labor case, in *NLRB* v.

[15] The petition is not uniformly respectful of its own cited autorities. At Pet. 7 and 15, petitioner asserted an alleged conflict within the Fifth Circuit citing *Jackson* v. *Phinney*, 266 F.Supp. 835 (WD Tex., 1967) as indicative of the necessity for resolution of the conflict by this Court. Holding the fishermen employees under § 3121 (d), the district court rejected the government's maritime argument, stating that "it seems questionable at best whether Congress in reaffirming the use of the common-law tests intended to thereby incorporate maritime law under the FICA and FUTA". (id., at 839)

Hearst Publications, Inc., 322 U.S. 111 at 122, saying: "* * * a person who * * * is held to be an 'independent contractor' for the purpose of imposing vicarious liability in tort may be an 'employee' for purposes of particular legislation, such as unemployment compensation."

Thus, while the fishermen may be excluded from the common-law type employee category they are nevertheless "employees" for maintenance and cure under the liberal tests applied in maritime law. In this regard this Court further stated (*id*, 322 U.S. at 126):

> "Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied."

In short, because of the difference in concept between an "employee" for federal tax purposes and an "employee" for compensation purposes under maritime law, the fishermens' right to maintenance and cure or Jones Act benefits cannot be considered an indication that they were employees in the common law sense. The sole issue here is whether these fishermen were employees within the meaning of the pertinent federal tax statutes. This question cannot be determined by whether or not they were employees within the meaning of the Jones Act or general maritime law. (Pet. 14) This action was brought by respondents solely to recover taxes overpaid by them. The fishermen have no direct interest in this controversy, nor does it appear their rights to maintenance and cure, or any other rights, are affected. The fishermen's status for other purposes is not in issue here, nor would it seem they were bound by any attempt to decide such status in a proceeding in which they are not parties.

This Court's observation in *Burlington Truck Lines* v. *United States*, 371 U.S. 156 at 173 is appropriate here:

> "'* * * nor should a determination under one statute be mechanically carried over into the interpretation

of another statute involving significantly different considerations and legislative purposes.' "

Thus it may be said that while petitioner's maritime concept is basic to the resolution of suits between owners, captains, crewmen and outside third parties, it is a non-sequitur in the resolution of tax controversies where the parties are solely the United States and the boatowner-respondents.

The opinion below observed that the Treasury Department unsuccessfully proposed to Congress that § 3121(d) be amended to include as "employees" captains and crewmen of the kind concerned here, irrespective of their employment status under the common law rules. The Committee's rejection of the agencies' maritime-oriented employee was considered by the Circuit Court as indicative of Congress' intention to retain the common law control test as the sole test here for tax purposes. (Pet. App. A, 7a and footnotes 5 and 6) In recent times Congress amended various parts of Sections 3121 and 3306 of the Internal Revenue Code, but subsections (d) and (i), defining "employee" remain intact—lending weight to the common-law definition of employee. If we understand the petition correctly, it invites this Court to sit as a congressional committee to bring about by its certiorari jurisdiction that which the Congress refused to do by legislative amendment.

Petitioner's reference to 26 U.S.C.A. § 3306(c)(17) (Pet. 13) demonstrates the government's confusion in attempting to frame an issue for the Court to resolve. Although proposed by the petitioner (Pet. 13-14), that section has no bearing on the old-age benefits program administered under Title II of the Social Security Act and the correlative tax provisions of the Federal Insurance Contributions Act (FICA), §§ 3121 et seq. Petitioner's reference deals solely with Title III of the Social Security Act, and the correlative tax sections of the Federal Unemployment Tax Act (FUTA), § 3306, et seq. The latter

provisions are concerned solely with grants of money to those states having unemployment insurance programs approved by the Social Security Administration. And even in this limited area, the common law standards prescribed in §§ 3306(i), Internal Revenue Code determine whether fishermen on vessels over 10 gross tons are employees for unemployment insurance tax purposes. A careful reading of § 3306(c)(17) shows that fishermen on vessels under 10 gross tons are exempt, irrespective of their status under the common law standard.

Petitioner's single reference to S.S.T. 387, 1940-1 Cum. Bull. 192, as the official position of the Social Security Administration (Pet. 7) is misleading. It cannot be the official or other position of anyone. It has no sanction in the law. S.S.T. 387 was promulgated under the Federal Insurance Contributions Act, Sections 1426(b)(14) and (g) of the Internal Revenue Code of 1939. The 1954 revision of the Internal Revenue Code renumbered the FICA as §§ 3121, et seq. The provisions relating to fishermen contained in the 1939 Code sections were deleted from FICA entirely in the 1954 Code. No basis for granting the writ is warranted by any contention put forth.

IV. The petitioner, in closing, sugggests that the contrary results in these cases may pose some administrative problems for the Social Security Administration in dispensing benefits. (Pet. 15-16) A further assertion is made that benefits may be denied to some, while they accrue to others without payment of the required social security taxes (Pet. 16). These notions are not only unsound, but disclose a gross misconception of the social security system.

It is common knowledge that following the enactment of the Self-Employment Contributions Act of 1950 (SECA) (64 Stat. 524) §§ 1401, et seq., Internal Revenue Code, all persons, employees under any test and others in service relationships, including conventional independent contractors (with few exceptions), are covered under the social

security program and accorded equal benefits. (Title II, Social Security Act; 49 Stat. 623 and 64 Stat. 482, 490) The benefits so accorded are based upon the individual's earnings. Taxes are paid by those liable for them and are collectible under the provisions of the FICA and SECA Acts. Under FICA the taxes are paid by the employer and employee in equal shares. The employer bears the burden of certain administrative duties and payments. His failure to abide by them may result in assessments and penalties and possible criminal sanctions. See, 26 U.S.C. § 7202. Under the Self-Employment Contributions Act (SECA) the individual pays the tax, (about ¾ of the combined FICA tax) and assumes the responsibilities for reporting and payment to the tax collector. The alleged problems, it seems, lie with the agencies who, for administrative convenience, bring pressure to bear on respondents and others to assume liability for taxes under FICA without a basis in law or fact.

The asserted "dilemma" of the Internal Revenue Service complained of (Pet. 17) is self-induced. Systematic refusal to consider (R. 3, par. 10) and summary disallowance of claims for refund, without examination of the working relationships in issue, are a standing National Office policy of the Internal Revenue Service in disposing of all boatowner-fishermen claims. By this device the agency transfers its entire administrative responsibilities to the courts to sift the validity of the claims on a case by case basis, and, by a show of statistics (Pet. 17) accuses the respondents and other taxpayers for the responsibility of increased calendar loads in the Fifth Circuit. Respondents were left no alternative in these circumstances but to bring this suit. Review of the decision below by writ of certiorari will not resolve the petitioner's administrative lapses.

CONCLUSION

The decision of the court below is clearly correct. There are no conflicts of decision, and the case does not call for review. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted,

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April 1969

APPENDIX

STATUTES AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

Sec. 3121. DEFINITIONS.

* * * *

(d) EMPLOYEE.—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee;

* * * *

Sec. 3306. DEFINITIONS

(i) EMPLOYEE.—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

* * * *

(26 U.S.C. 1955 ed., Sec. 3121 and 3306)

Treasury Regulations under the 1954 Internal Revenue Code, promulgated under the Federal Insurance Contributions Act:

§ 31.3121 (d)-1. Who Are Employees.

(a) * * *

(c) Common Law Employees. (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing service as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, den-

tists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees. If an individual enters into an agreement with another person pursuant to which such individual undertakes or produce a crop or livestock on land owned or leased by such other person and pursuant to which (i) the crop or livestock produced by such individual or the proceeds thereof are to be divided between such individual and such other person, and (ii) the amount of such individual's share depends on the amount of the crop or livestock produced, such individual is, with respect to such undertaking an independent contractor and not an employee.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

Treasury Regulations promulgated under the Federal Unemployment Tax Act,

§ 31.3306(i)-1. Who Are Employees

* * * *

are the same for purposes of this case as provided in § 31.3121(d)-1, Federal Insurance Contributions Act and Regulations thereunder.

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1124

UNITED STATES OF AMERICA

v.

W. M. WEBB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

Although the substantive arguments made in the respondents' brief in opposition are adequately dealt with in the petition, we file this reply brief to discuss and to clarify one point of fact. This is prompted by the assertion in the brief in opposition (p. 2, n. 1) that there is a "material distortion in petitioner's statement * * * (Pet. 4): 'The captain could be fired if he failed to follow a respondent's instructions (R. 224).'"

The record reference is to finding 13 of the district court (R. 224):

> The arrangement between the plaintiffs and each captain was entirely oral. The term of the arrangement was not specified, but it was

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understood to persist for a fishing season. It could be terminated by either party, voluntarily or involuntarily, at the conclusion of any trip during a season. This could occur only when a boat was in port and before another fishing trip was commenced. While the arrangement could be so terminated, custom and practice was for it to be continued for the season.

This finding is supported by paragraphs 58–62 and 86–87 of the stipulation of fact entered into between the parties (R. 214, 218):

58. Any individual selected as captain would be one in whose honesty and integrity plaintiffs had confidence.

59. In addition to the confidence reposed above, the plaintiffs expected a captain to be able to—

(*a*) operate the boat;

(*b*) conduct the fishing operations, and

(c) select and get along with the crew he selected.

60. The arrangement between the plaintiffs and each captain was entirely oral.

61. It could be terminated voluntarily or involuntarily, although in practice this occurred only at times when a boat was in port.

62. While the arrangement could be terminated at any time, custom and practice was for it to be continued over an extended period of time for each boat and for more than one trip.

* * * * *

86. When a captain's action aboard a boat was such as to endanger the lives of the personnel or damage property, the plaintiffs would refuse to let him take the boat out again and sever relations with him.

87. The plaintiffs would sometimes terminate a relationship with a captain who was unable to produce adequate catches of menhaden.

It is also supported by the following excerpt from the testimony of Jack T. Styron, an executive of Wallace Menhaden Productions, one of the respondents here (R. 41, 42, 43–44):

Q. Is it indicated to the captain by the owner that as long as his performance is satisfactory, he will fish the boat for that season?

A. Right.

Q. Is it also understood that he can be terminated at the end of any day's work, so to speak, if his performance is not satisfactory?

A. That is correct.

* * * * *

Q. Well, will the boat owner sometimes terminate a captain because of a failure to produce adequately?

A. Oh, yes.

* * * * *

Q. What other reasons for a captain's termination have occurred other than an inability to produce at an adequate level?

A. Health.

Q. Have you had disciplinary problems to cause termination of a particular captain?

A. Not particularly.

Q. Do you recall any other specific reasons for what I will call "involuntary termination," where the captain wanted to continue and you said, "No, I am taking the boat away from you," other than an inability to produce?

A. I can't recall of any instance where the man—we have been lucky that the caliber of

> the captains has been such that they didn't get in jail or weren't accused of raping somebody or something, but that has been a factor in some instances in our competitors' operations. It is something that could be terminated [58] tonight if the owner of the vessel felt that the captain wasn't best suited. He could call the captain in and say, "Listen, I don't think that you are performing properly and you are not producing. You bring the papers to the office, and that is the end of the operation." By the same token, the captain can call in and say, "I am bringing the papers in, I don't want any more of this." It is kind of a loose way of doing things, but that is the way it is done.

Thus it is clear that the captain could be fired at the end of any voyage, with or without cause. The practical test was the captain's performance, and the criterion was the satisfaction and judgment of the owner as to the captain's ability to perform in accordance with the owner's wishes. In short, the relationship was no different than that between any employer and his supervisory personnel.

Respectfully submitted.

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Solicitor General.

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In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1124

UNITED STATES OF AMERICA, PETITIONER

v.

W. M. WEBB, INC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 314–337) is reported at 271 F. Supp. 249. The opinion of the court of appeals (R. 357–365) is reported at 402 F. 2d 956.

JURISDICTION

The judgments of the court of appeals were entered on November 6, 1968. (R. 338–351.) After an extension of time, the petition for a write or certiorari was timely filed on March 6, 1969, and was granted on April 28, 1969. The jurisdiction of this court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the captains and crews on fishing boats are employees of the boat owner for the purpose of the Federal Insurance Contributions Act, 26 U.S.C. 3121 *et seq.*, and Federal Unemployment Tax Act, 26

U.S.C. 3306 *et seq.*, when they are engaged under the so-called "lay" or similar system whereby the captain has discretion in hiring and firing the crew and the captains' and crews' compensation is measured by the volume of the catch.

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Sections 3111, 3121, 3301, and 3306 of the Internal Revenue Code of 1954 and Sections 31.3121(a)–1, 31.3121(d)–1, 31.3306(b)–1, and 31.3306(i)–1 of the Treasury Regulations on Employment Tax are printed in the Appendix, *infra*, pp. 39–45.

STATEMENT

The fourteen respondents in these five cases are engaged in the business of fishing for menhaden.[1] Each owns one or more boats which fish for the menhaden both in the Atlantic Ocean and Gulf of Mexico. The vessels ranged in length from 85 to 150 feet and their cost varied between $24,000 and $157,000, depending upon age and size. (R. 58, 152, 318.) Respondents sell the catch to fish processing plants.[2] (R. 126–127, 317.)

[1] Menhaden fish are processed into fish meal and a fish "soluable," which is used for commercial feed. It is also processed into fish oil for use as a base in paints. During World War II, the fish were prepared for eating and exported to Russia. It has also been used to prepare an oil used in Europe for the manufacture of margarine. (R. 85–87).

[2] The boats operated from docking facilities owned by the processing plants. During the taxable periods the processing plants were separate and distinct operations. However, individual shareholders of the corporate respondents held shareholder interests in some of the processing companies. (R. 82–84, 150, 318–319.)

Each respondent operates in substantially the same manner. The owner fully equipped his vessels for menhaden fishing, and made and paid for all repairs and insurance on the boats (R. 57, 110, 113, 114, 156, 187, 301–302, 319). He would then secure the services of an experienced fisherman to be captain of the vessel. A captain was generally selected because the respondent had confidence in his honesty and integrity, and had trust in his ability to select, organize, and supervise a crew to operate the boat and conduct successful fishing operations (R. 63, 90–92, 93, 319). No special license or papers were required to become a captain. (R. 101, 133.) Once a captain was selected, it was only necessary for him to register as captain of a boat with the Bureau of Customs. (R. 62, 63, 319, 320–321.) The captains hired and fired the crew and supervised and controlled the crew's activities at sea (R. 92, 99–101, 108, 124, 153, 162–163, 178–179, 182, 204, 217–218, 224, 246, 264, 323, 324).

The arrangement between captain and owner was oral and had no specified term. In custom and practice it lasted an entire season. Some captains fished consecutive seasons for the same owner. Each of the seven captains whose testimony is in the record worked for one owner for periods—having some short interruptions—ranging from 15 to 40 years (R. 162, 174–175, 213, 221, 231, 244, 262–263). However, nothing in the arrangement assured any captain the use of a particular boat, or in fact any boat, beyond a single fishing season (R. 63, 101, 122, 133–135, 153, 162, 174, 176, 193–194, 210–213, 215, 221, 231–232, 244, 253–254, 320, 321, 322). Each season was the subject

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of new and separate negotiations between boat owners and captains (R. 101, 133–134, 320). Although there have been instances of captains leaving one owner to work for another, respondents consider it "good business" not to "raid" each other's fleet (R. 123–124).

The relationship could be terminated at any time, voluntarily or involuntarily, by owner or captain; in practice this would occur when the boat was in port at the conclusion of any fishing trip. An owner would dismiss a captain who endangered the personnel, damaged property, failed to produce adequate catches, was charged with a crime, or otherwise failed to give what the owner considered satisfactory performance. (R. 63, 67, 99–100, 101, 102, 103–104, 111–112, 252, 299–300, 320).

After a captain was selected, the boat was turned over to him. He then registered the boat and himself with the Bureau of Customs, as required by federal law (R. 320). The owner fixed the number of crewmen to be paid. Subject to the owner's disapproval, the captain could sail with fewer men. He could, on his own, hire more men. In either event, the amount the owner had allotted to the crew would not be changed. Rather, the money would be split among fewer or more men (R. 117–118, 166, 171, 189–190, 214–215, 235–236, 238, 259, 265–266, 323). The captain selected the men he desired to compose his crew. Aside from himself, the boat's crew consisted of a mate, pilot, engineer, cook and about 20 net handlers during the taxable period in issue (R. 152–153, 323).

Respondents also fixed the pay scale of the crew. (R. 96–97, 98–99, 180, 187, 197, 232, 235, 323.) Respondents paid their captains at an agreed dollar amount per unit[3] of fish caught and delivered to the fish processing plants, generally two dollars to three dollars for each 1,000 fish caught[4] (R. 95, 153–154, 181, 249, 277–278, 326). In addition, respondents agreed to pay a bonus for each unit of fish caught. The bonus was divided among the captain and crew at the conclusion of a fishing season on a basis negotiated between the captain and each crew member, and was generally earned only by crewmen who stayed on until the end of the fishing season. R. 94, 96, 132, 138–140, 144–145, 190–191, 207–208, 226, 234, 252–253, 326–327.) A failure to produce a catch resulted in no remuneration to the captain and crew (R. 65, 218, 240, 241, 326, 331).

Before the beginning of each fishing season, captains were given a "paysheet" setting out the amount which in respondents' estimation should be paid the individual crewmen under the captain (R. 96–97, 98–99, 164, 206–207, 225, 234, 235, 248, 264, 323). Respondents required the captains to prepare and turn in bi-weekly payroll records and annual income tax withholding forms and social security tax forms for their crews. Each captain, in turn, kept daily payroll records for his crew. (R. 104–106, 164–165, 188–189,

[3] The unit of measurement, 1,000 fish, was the average volumetric content of an unloading device at the processing plants. The unit generally weighed around 660 pounds. (R. 75–76.)

[4] A new and complete set of personal and financial records was kept for each boat for each new season by the processing plant from which the boat operated (R. 322).

225–226, 250, 322, 327, 328–329.) The processing plant prepared a tally sheet after each fishing trip, showing the volume of the catch, and the captains prepared a payroll settlement sheet for each boat (R. 104–105, 154–155, 164–165, 328–329). Respondents issued bi-weekly payroll checks. The checks were delivered to the captains who, in turn, distributed them to the crew (R. 104–106, 157, 188–189, 209–210, 250, 328–329).

The actual fishing season for menhaden varied according to the area where the fish were running (R. 72–74). It usually began in the Gulf about April 15 and concluded about October 1. Along the Atlantic seaboard, the summer season ran from about May 15 to September 15 and winter fishing ran from November 1 through January 15. The respondents would decide the location where each captain would fish, a decision that depended on both the availability of fish and the owner's judgment of the particular captain's abilities.[5] Some boats and captains moved back and forth between fishing grounds to take advantage of the staggered seasons (R. 57–58, 72–74, 175–176, 321). Each fishing trip usually lasted a single day and was taken in the vicinity of the processing plants to facili-

[5] The decision was guided by the seasonal presence and availability of menhaden. If a respondent had an option of two places to fish, the captain's preference was a factor in the ultimate decision (R. 185–187, 227–228, 332). The captains chose the fishing spots either by guidance of spotter planes, supplied by processing plants, or upon the recommendation of other captains who had already located a good fishing area. A two-way radio on board the vessels provided the means to make contact with these information sources. (R. 59, 183–184, 200–201, 205, 234, 251–252, 332–333.)

tate immediate unloading of the catch. (R. 74, 81, 151, 156, 163, 330.)

In addition to determining the general area to be fished, respondents designated the processing plants to which the catch was to be delivered. (R. 92–93, 107, 151, 163, 169, 185–187, 205–206, 226, 227, 232, 233, 247, 250–251, 265, 317, 320, 321, 331.) Once the trip was commenced, the captain was in full charge of the boat; he decided when to start and terminate a trip and the precise spot to be fished. (R. 64, 163–164, 183–184, 222–225, 234, 251–252, 324.)

Respondents required that intoxicating liquors not be taken aboard the boats, established restricted areas which were not to be fished, and required the captain to keep the boat clean, to keep the engines in working order, and properly to moor and to watch the boat while in port (R. 116–117, 124, 325). They had the right to control the captain's work, and did so as each thought necessary to assure a favorable result from the undertaking (R. 333).

The crew paid for the cost of their groceries for each trip and for their own foul weather gear. Respondents paid for the cost of fuel and advanced money to the captain to pay for groceries and other needs. Respondents bore the risk of loss if the crew failed to earn enough over the season to pay for the groceries. (R. 65, 109, 110, 112–113, 116, 159, 169, 187–188, 189, 208–209, 240, 254–255, 328, 332). Respondents also paid the captains' and crews' transportation expenses when they had to travel from North Carolina to Louisiana (R. 182, 233, 241, 247, 323).

Respondents filed Federal Insurance Act and Fed-

eral Unemployment Act tax returns for the periods in issue and paid the employer's share of the taxes due on the earnings of the captains and crews. Claims for refund were timely filed, and, after the expiration of six months, respondents commenced these refund suits in the district court. (R. 19, 26, 32, 38, 43, 334.) That court held that the respondents were not employers of the captains and crews (R. 336–337). On the government's appeal, the Fifth Circuit affirmed (R. 356, 366). The petition for a writ of certiorari was granted on April 28, 1969 (R. 367).

SUMMARY OF ARGUMENT

The Federal Insurance Contributions Act and Federal Unemployment Tax Act define an employee as any individual who, under the usual "common law rules" applicable in determining the employer-employee relationship, has the status of an employee. Those rules require examination and evaluation of a variety of factors, which have been enumerated in the pertinent Treasury Regulations and court decisions. These include the right to control the work, the relative degree of investment in the enterprise by the purported employer and the purported employees, the furnishing of tools and a place to work, the opportunity for profit or loss, the mode of payment, and the permanency of the relationship.

Congress has made clear that there should not be a rigid or narrow application of these standards. Rather, Congress expressly urged a "realistic" application of these rules as they were expressed by this Court in *United States* v. *Silk,* 331 U.S. 704, and

Bartels v. *Birmingham,* 332 U.S. 126. Congress also has, on two occasions, cautioned that "A restricted view of the employer-employee relationship should not be taken in the administration of the Federal old-age and survivors systems in making coverage determinations." H. Conf. Rep. No. 2771, 81st Cong., 2d Sess., p. 104, quoting from the legislative history of the Social Security Amendments of 1939.

I

Any realistic application of the common law rules to the relation between boat owners and their fisherman should be based on that particular body of law which governs the unique undertaking of menhaden fishing. It takes place on the high seas, and requires a master on board the vessel, to command its crew and control its course. Maritime law, which the courts below refused to consider, is the body of laws which govern every aspect of the operation, and is the proper means of analyzing the relationship of the owner to the fishermen who operate his boats. Otherwise, the general purposes of the Social Security and unemployment legislation and the manifest Congressional intent to apply these statutes to fishermen working on larger boats will be frustrated.

Under maritime law, the captains and crew are in an employment relationship with the respondents, and the court of appeals so acknowledged. Under settled principles, the boat owner is the employer of captain and crew unless the master of the vessel has become owner *pro hac vice* by a demise charter. For a demise charter to exist, the owner must surrender

the entire possession, control, and navigation of the vessel, which respondents clearly did not do. When, as here, the undertaking is for the general interest of the owner, the master of the vessel is his agent, the acts of the master are those of the owner, and the owners—here the respondents—employ the captain and crew.

This conclusion accords with the rules that generally control the liability of a ship owner to the men who sail his vessel and to third parties under the rule of *respondeat superior*. An administrative interpretation which the Treasury has adopted in implementing its duties to collect these taxes, S.S. T. 387, 1940–1 Cum. Bull. 192, and which the Social Security Administration follows in implementing its duties to determine eligibility for benefits, takes the same position. The deference due these long-standing administrative positions alone requires reversal of the decision below. *E.g., United States* v. *Correll*, 389 U.S. 299, 305–306; *National Labor Relations Board* v. *United Insurance Co.*, 390 U.S. 254, 260.

II

Even if the principles of general maritime law are not applied here, the captains and crews should be adjudged the employees of respondents. Paramount, although not exclusive, in this determination, is respondents' ultimate control over the entire operations. An owner could fire a captain at any time during the fishing season for any reason the owner deemed satisfactory. The owners determined what boats the respective captains were to command, the general geographic area they were to operate in, and the disposition of the catch. By completely outfitting the boats, the

owners effectively limited the means available for catching menhaden. The owners issued a pay scale to the captains at the inception of each season, and also issued directives as to the size of the crew.

The fact that respondents were the entrepreneurs also shows that they were the employers. The captains and crews had no opportunity to participate in the profits; they were paid on a piece-work basis. Respondents made the capital investment and paid for repairs and operating costs. Although the fishermen did not have a continuous working relationship with the owners, captains did remain with the various respondents for periods ranging up to forty years. During the fishing season, respondents employed bonuses as a means of retaining the services of fishermen. In these respects, there is no discernible difference between menhaden fishing and any other seasonable business.

All these facts show the existence of an employment relation and entirely fail to support the contrary conclusion of the courts below.

III

The court of appeals thought that its review of this case was limited by the "clearly erroneous" standard. But there is no dispute with respect to the underlying facts here. Although the case involves a so-called "mixed" question of fact and law, the inquiry on review is the application of a legal standard to undisputed facts. In such a posture, the issue for review is basically one of law and permits plenary appellate

review. This Court's analysis in *United States* v. *Silk, supra,* and *Bartels* v. *Birmingham, supra,* supports this conclusion. *National Labor Relations Board* v. *United Insurance Co., supra,* provides even more direct authority for this view. And the contrary conclusion would be entirely inconsistent with the expectation of the Congress that there would be nationwide uniformity in the application of these laws.

ARGUMENT

INTRODUCTION

The ultimate problem here is to determine whether respondents are liable for the employers' share of Social Security and federal unemployment taxes on the earnings of the captains and sailors who man respondents' fishing boats. This, in turn, depends upon the proper characterization of the relationships between the owner, the captain, and the crew.

In point of theory, the captains could be employees of the owners, joint venturers or independent contractors. The crewmen could be employees of either the owner or the captain. Analysis begins with the Federal Insurance Contributions Act and Federal Unemployment Tax Act, which impose excise taxes upon the "employer," measured by the "wages" paid his employees. Sections 3111 and 3301, Internal Revenue Code of 1954 (Appendix, *infra* pp. 39–40).[6] In turn,

[6] The term "wages" is defined in Sections 3121(a) and 3306(b) (Appendix, *infra* pp. 39, 40), with exceptions not here relevant, as "all remuneration for employment". The term "employment" is defined in Section 3121(b), and Section 3306 (c) as "any service * * * of whatever nature, performed * * * by an employee for the person employing him * * * on or in connection with an American vessel * * *."

"employee" is defined in Section 3121(d)(2) of the Code for purposes of the Federal Insurance Contributions Act as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee". Although phrased somewhat differently, Section 3306(i)(1) also refers to the "usual common law rules applicable in determining the employer-employee relationship" in defining "employee" for the purposes of the Federal Unemployment Tax Act.

Thus, Congress has determined that the existence of an employment relationship, and consequently respondents' liability for the employers' FICA and FUTA taxes, should be determined according to the rules of the "common law". This means that the tests generally used when liability depends on the existence of an employment relationship—as in applying the doctrine of respondeat superior or in determining liability for workmen's compensation—control here.

Section 31.3121(d)-(1)(c)(2) of the Treasury Regulation on Employment Tax (1954 Code) (Appendix, *infra* pp. 42–43) implements the statutory definition. It provides:

> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is

> subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. * * *

See, also, Restatement of the *Law of Agency* (2d ed.), Section 220. The Regulation recognizes other factors as characteristic of an employer-employee relationship, but not necessarily present in every case: the right to discharge; the furnishing of tools and furnishing of a place to work to the individual to perform the services; the opportunity for profit or loss by the alleged employee; the degree of skill required in the occupation; the permanency of the relationship; and the mode of payment. See *United States* v. *Silk*, 331 U.S. 704; *Enochs* v. *Williams Packing Co.*, 370 U.S. 1; *Illinois Tri-Seal Products, Inc.* v. *United States*, 353 F. 2d 216 (Ct. Cl.); and *Kirkconnell* v. *United States*, 347 F. 2d 260 (Ct. Cl.).

These general criteria of the common law, which the Regulations describe, must be interpreted and applied in a practical fashion to each case. The common law is neither static nor stultified as of any particular time, but adapts itself to a broad variety of basic conditions. Congress plainly intended this concept of an evolving common law to be used in Social Security matters. In recommending the predecessor

of the current statute,[7] the Senate Committee approved (S. Rep. No. 1255, 80th Cong., 2d Sess., pp. 1-2, 7) this Court's decisions in *United States* v. *Silk, supra,* and *Bartels* v. *Birmingham,* 332 U.S. 126, stating (S. Rep. 1255, *supra,* at p. 7):

> In the view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an "employee" for purposes of applying the Social Security Act.

When the statute was amended again in 1950,[8] the conference report took the opportunity to quote language previously used in connection with the Social

[7] Section 1, Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438, amending Sections 1426(d) and 1607(i) of the Internal Revenue Code of 1939. These amendments were made retroactive to August 14, 1935, with respect to the Social Security Act, and to February 10, 1939, with respect to the Internal Revenue Code of 1939.

Prior to 1948, the statute (Sections 1426(d) and 1607(i) of the Internal Revenue Code of 1939) merely provided that "the term 'employee' includes an officer of a corporation." Treasury regulations drafted in an attempt to clarify this vague provision resulted in conflict and inconsistency with which this Court dealt in *Silk* and *Bartels*. Out of concern that regulations proposed after these decisions would extend the Act, Congress added an express reference to the "common law rules" in 1948. See H. Rep. No. 1319, 80th Cong., 2d Sess., pp. 1-4; S. Rep. No. 1255, 80th Cong., 2d Sess., pp. 1-13; 94 Cong. Rec., Part 2, pp. 1893-1894.

[8] Section 205(a) of the Social Security Act Amendments of 1950, c. 809, 64 Stat. 477.

Security Amendments of 1939 (H. Conf. Rep. No. 2771, 81st Cong., 2d Sess., p. 104):

> "A restricted view of the employer-employee relationship should not be taken in the administration of the Federal old-age and survivors insurance system in making coverage determinations. The tests for determining the relationship laid down in cases relating to tort liability and to the common-law concept of master and servant should not be narrowly applied. * * *"[9]

These interrelated congressional admonitions—that the statute is to be "realistically applied" and that a "restricted view" is to be avoided—have an essential part in this case. We contend—and later in this brief we shall argue (pp. 25–31, *infra*)—that the captains and crewmen are respondents' employees however narrowly the statutory definition of employee is interpreted. But our principal position, and the point that gives rise to the conflict between the Fifth Circuit's decision here and the Court of Claims' application of the statute in *Cape Shore Fish Co.* v. *United States*, 330 F. 2d 961, involve the relevance of maritime law to this case. Throughout this proceeding, we have urged that the employer-employee relationship should be evaluated according to the general principles of maritime law that are traditionally applied in the context of seafaring operations. Both lower courts categorically refused to do so, although the court of appeals observed that if it were free to apply maritime

[9] The legislative history of the amendments is discussed in *United States* v. *Thorson*, 282 F. 2d 157, 159 (C.A. 1); *Ringling Bros.-Barnum & Bailey Com. Shows* v. *Higgins*, 189 F. 2d 865, 868–869 (C.A. 2); and *Party Cab Co.* v. *United States*, 172 F. 2d 87, 89–91 (C.A. 7).

law it would reverse the decision of the trial court (R. 362).

We first turn to this question, contending in Point I of this brief that the lower courts' refusal to consider maritime law requires reversal of its decision. This we submit, is the realistic, nonrestrictive reading of the statute. In Point II of this brief we contend that the same result should follow even though principles developed with respect to land based operations are applied in determining the application of the "common law rules" to the construction of the word "employee."

I. THE "COMMON LAW RULES" APPLICABLE IN THE DETERMINATION OF THE RELATIONSHIP BETWEEN BOATOWNERS AND FISHERMEN FOR SOCIAL SECURITY PURPOSES INCLUDE GENERAL PRINCIPLES OF MARITIME LAW, THE COMMON LAW OF THE SEA

As the Treasury Regulations make clear, application of the "common law rules" in determining whether a given circumstance constitutes an employer-employee relationship requires evaluation of a variety of factors. "As stated in *United States* v. *Silk,* 331 U.S. 704, 716, 'degrees of control, opportunities for profit or loss, investment in facilities, permanency of relation and skill required * * * are important for decision * * *'." *Enochs* v. *Williams Packing Co.,* 370 U.S. 1, 3; compare *National Labor Relations Board* v. *United Insurance Co.,* 390 U.S. 254. Although all of these factors are significant, the most important is the degree of control that the purported employer may exercise over the purported employees. Indeed, in this case

the relative discretion the fishing boat captains have over the hiring and firing of crews, the fishing schedules, and the shipboard activities was the most important element in the decision of the Fifth Circuit to sustain the result the trial court reached in this case (R. 361).

It is plain, however, that the significance given the captain's discretion depends on the standards by which his function is judged. Although the captain does not have complete control of these matters, is restricted by metes and bounds established by the owner, and in many respects is subject to the veto of the owner, his discretion is unusually broad if it is compared to many land-based industries. However, most of his discretion is necessarily dictated by the nature of the activity—that it takes place away from the shore—and the owner's ability to exercise control has always been severely limited. But this is true of every maritime activity. Under maritime law, this relative lack of direct control has never allowed the boat owner to escape the duties that the maritime employer owes to his employees—as for example in providing maintenance and cure. It is well established in the maritime cases that these obligations exist except when there is a bareboat, or demise, charter. See, *e.g., The Norland,* 101 F. 2d 967 (C.A. 9); *Cromwell* v. *Slaney,* 65 F. 2d 940 (C.A. 1); *The Carrier Dove,* 97 Fed. 111 (C.A. 1); *Justillian* v. *Versaggi,* 169 F. Supp. 71 (S.D. Tex.). The same is true of the other factor here which supports the argument that the crewmen are not respondents' employees—their method of compensation. See, *e.g., Hudgins* v. *Gregory,* 219 F. 2d 255 (C.A. 4); cf. *Guzman* v. *Pichirilo,* 369

U.S. 698. In fishing industries compensation on a share or "lay" basis does not make the recipient a joint venturer or partner; such compensation is still considered wages. See *Thomas* v. *Osborn,* 19 How. 22; *United States* v. *Laflin,* 24 F. 2d 683 (C.A. 9); *Old Point Fish Co.* v. *Haywood,* 109 F. 2d 703 (C.A. 4); *Vitco* v. *Joncich,* 130 F. Supp. 945 (S.D. Calif.) affirmed, 234 F. 2d 161 (C.A. 9); see, generally, Gilmore and Black, *The Law of Admiralty* (1957) 256–257. In the *Vitco* case Judge Mathes summarized the law in these words (130 F. Supp. at 949–950):

> From the earliest times the seaman's share in the proceeds of the voyage has been considered "as in the nature of wages." *Harden* v. *Gordon,* 11 Fed. Cas. at page 481, No. 6,047. "Although seamen in whaling (fishing) voyages are compensated by shares of the proceeds, this compensation is always treated as in the nature of wages. They are never deemed partners * * * the very nature of the service excludes the notion of partnership. It would defeat the very objects of the parties." Story, J. in Reed v. Canfield, supra, 20 Fed. Cas. at page 429, No. 11,641; 3 Kent's Commentaries, 34 (8th ed. 1844).

The captains are not charterers of respondents' vessels.[10] Therefore, as the Fifth Circuit recognized (R.

[10] For such a charter to exist, the entire possession, control, and navigation of the vessel must be surrendered. See, *e.g.*, *Peters* v. *Rohrman,* 272 Fed. 338 (D.N.J.). Anything less than a transfer of the entire possession, control, and navigation of the vessel will not amount to a demise charter. The burden of establishing a demise charter is heavy, and this Court declines to find a demise relation when the dealings between the par-

362), respondents would be liable for the employers' share of the FICA and FUTA taxes if their relationship to the captains and crewmen is gauged by the traditional standards of maritime law.

The choice, then, is between two quite different interpretations of the phrase "common law rules" as used in the Social Security and federal unemployment legislation. One, which the Fifth Circuit adopted, would look at the "common law" in a highly technical sense, and use only those standards of land-based industries which were historically subject to the jurisdiction of "common law" courts. The other is that applied by the Court of Claims; in essence it interprets the phrase "common law rules" in a generic rather than technical sense, and, in a maritime situation, recognizes the realities of the sea, and relies on those principles of maritime law which have traditionally been the "common law" of seafaring men, though developed and applied in "admiralty."

Nothing in the legislative history fairly ascribes to Congress the anomalous intent of having maritime activities subject to standards, for Social Security purposes, other than those which are relevant to enterprises conducted at sea. Rather, we should sup-

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ties are consistent with a lesser relationship. *Guzman* v. *Pichirilo*, *supra*, 369 U.S. at 700.

It is clear that the arrangement between respondents and their captains here did not constitute demise charters. The testimony of Styron (R. 127) that none of the respondents chartered their vessels for a season to a captain or someone else clearly establishes that fact. So does the fact that the captains were obliged to return their catch to processing plants designated by, and for the account of, the respondents (R. 317–318, 320–321).

pose Congress intended the employer-employee relationship to be evaluated according to the standards that have been traditionally applied in the context of a particular industry. "A realistic application is to be made of the common-law rules pertinent in determining the employer-employee relationship, and the terms 'employment' and 'employee' are to be construed, not in a restricted sense, but so as to accomplish the purposes of the legislation involved". *Westover* v. *Stockholders Publishing Co.*, 237 F. 2d 948, 951 (C.A. 9). Were this approach not taken here, it would be impossible to conclude in the usual case that a seaman is the employee of a boat owner unless the owner happens to act as captain for the voyage.

Congress quite clearly thought that the FICA and FUTA legislation would apply to seamen. The term "employment" is defined (Section 3121(b) and Section 3306(c)) as "any service * * * of whatever nature, performed * * * by an employee for the person employing him * * * *on or in connection with an American vessel* * * *." (emphasis supplied) (see p. 12, n. 6, *supra*). And Congress just as plainly intended the legislation to cover fishermen, for Section 3306(c)(17) of the Social Security Act, 26 U.S.C. 3306(c)(17), exempts fishermen from Social Security coverage, except when on ships over ten tons in displacement. The inference is clear that Congress was of the view that "common law rules" would be applied to ships of the greater tonnage.

This congressional expectation would be severely frustrated if ship owners were relieved of responsi-

bilities for Social Security taxes unless their relationship with the captians and sailors were such as would give rise to an employer-employee relationship in a land-based activity. If the owner did not have the burdens the Social Security laws place upon the "employer," then the captain would have them, for he would then necessarily be the "employer" of the crewmen. But this would be the same as imposing, in a land based industry, the liability for Social Security taxes on the manager of one plant of a large corporation. It would represent a wholly unrealistic placement of the liability, and it would represent the type of restrictive view of the scope of Social Security legislation that Congress on two occasions warned against. See pp. 15–16, *supra*.

The Fifth Circuit's decision here is contrary to a long standing Treasury interpretation set forth in S.S.T. 387, 1940–1 Cum. Bull. 192.[11] That ruling, which the Social Security Administration has accepted for purposes of paying benefits to claimants, holds that the boat owner is the employer of captains and crewmen on fishing boats operated under terms and conditions essentially similar to those of record in this case. This ruling is not to be lightly rejected. First, as a long standing administrative interpretation, it comes within the rule that "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially reenacted statutes, are deemed to have received congressional approval and have the effect

[11] S.S.T. 387 was not cited to the court of appeals.

of law."[12] *United States* v. *Correll,* 389 U.S. 299, 305-306; *Fribourg Nav. Co.* v. *Commissioner,* 383 U.S. 272, 283; *Helvering* v. *Winmill,* 305 U.S. 79, 83. Of equal importance, the Social Security Administration has accepted the same interpretation in implementing its duties to determine who is eligible for benefits. This is also entitled to the deference paid administrative determinations, even though no special administrative expertise is involved. *Natonal Labor Relations Board* v. *United Insurance Co., supra,* 390 U.S. at 260; see also, *Universal Camera Corp.* v. *National Labor Relations Board,* 340 U.S. 474, 488.

These administrative interpretations are further confirmed by the interpretation ordinarily given words such as "employer" when used in maritime ventures. In nontax contexts, when courts are asked to determine whether seafarers are employees of the vessel's owner, they look to maritime law. The Jones Act (the Merchant Marine Act of 1920, c. 250, 41 Stat. 988, Section 33, 46 U.S.C. 688) grants a seaman a right to receive benefits if he is injured "in the course of his employment," and there is no further definition of "employment." In such cases, there has been uniform application of maritime law principles to the determination of whether an employee-employer relationship exists. See, *e.g., Justillian* v. *Versaggi, supra; Farmer* v. *O/S Fluffy D,* 220 F. Supp. 917 (S.D.

[12] Although the 1948 and 1950 amendments have intervened, they were not intended to change the rule in effect in 1940. On the contrary, the legislative history shows express approval of this Court's interpretation of the statute and regulations in existence in 1940. At all events, S.S.T. 387 has remained in force continuously since 1940, and the statutory language has been settled since 1950.

Tex.); *Moore* v. *The O/S Fram,* 226 F. Supp. 816 (S.D. Tex.), affirmed *sub nom. Wilhelm Seafoods* v. *Moore,* 328 F. 2d 868 (C.A. 5); *Quinn* v. *Porter,* 215 Miss. 314, 60 So. 2d 797; *Southern Shell Fish Co.* v. *Plaisance,* 196 F. 2d 312 (C.A. 5); *Hurgins* v. *Gregory,* 219 F. 2d 255 (C.A. 4). In these cases the owner is generally liable when the boat is not held under a demise charter. And the same is true of the owner's liability to third parties for the acts of the crew—*i.e.,* in the application of the doctrine of *respondeat superior* to maritime activities, the owner is liable unless there is a demise charter. See *The Barnstable,* 181 U.S. 464.

Furthermore, the Fifth Circuit's decision here portends consequences beyond the particular Social Security problem in issue. Indeed, if taken at face value, the decision below jeopardizes the application of the National Labor Relations Act to maritime industries. Although the Labor Act uses different language than the Social Security legislation, the effect is the same—to determine the presence of employer-employee relations according to the rules of the common law. See *National Labor Relations Board* v. *United Insurance Co., supra.* The duty to bargain and the other rights and obligations created under the Labor Act run between the employer and employee. In the seafaring context, it has, to now, always been thought that these obligations are present in dealings between the captain and crew on the one hand and the owner or demise charterer on the other.[13] But if the result below is correct,

[13] See the discussion of the union contracts in *Cape Shore Fish Co.* v. *United States, supra,* and *National Labor Relations Board* v. *Seine and Line Fishermen's Union of San Pedro,* 374 F. 2d 974 (C.A. 9).

then, presumably, it may be argued that there should be reevaluation of the manner in which the Labor Act is applied to persons such as the captain and crew with whom respondents deal.

II. RESPONDENTS ARE EMPLOYERS OF THE CAPTAINS AND CREW EVEN UNDER LAND-BASED CRITERIA

Even if the Court should reject the contentions set forth in the preceding section of this brief, we submit that the decision below should nevertheless be reversed. Taking land-based industries as the criteria for testing the relationship between respondents and the seamen on their boats, the undisputed facts of this record show an employment relationship.

As we have pointed out above, pp. 13–14, *supra,* the application of the "common law" test requires that a variety of factors be examined. These include the ability of the respondents to control the activities and hire and fire the captain and crew, the relative opportunity of respondents and their captains for profit or loss, the relative investment each party has, and the degree of permanence in the relationship. Of these the right to control is of particular importance.

These tests may be summarized as asking who, in the given situation, is the entrepreneur. Thus, many years ago, Judge Learned Hand, in oft-quoted language, said this in construing the term "employed" in an early employer's liability statute (*Lehigh Valley Coal Co.* v. *Yensavage,* 218 Fed. 547, 552–553 (C.A. 2), certiorari denied, 235 U.S. 750):

> It is true that the statute uses the word "employed," but it must be understood with

> reference to the purpose of the act, and where all the conditions of the relation require protection, protection ought to be given. It is absurd to class such a miner as an independent contractor in the only sense in which that phrase is here relevant. He has no capital, no financial responsibility. He is himself dependent upon the conditions of his employment as the company fixes * * *. By him alone is carried on the company's only business; he is their "hand," if any one is. Because of the method of his pay one should not class him as though he came to do an adjunctive work, not the business of the company, something whose conduct and management they had not undertaken.

Much the same has been said in describing the conditions that must be met to impose vicarious liability under the doctrine of *respondeat superior*. See Douglas, *Vicarious Liability and Administration of Risk I*, 38 Yale L.J. 584, 597; Tiffany on *Agency* (2d ed. 1924) 102, 103–104; 2 Harper and James on *Torts* (1956) 1400; Prosser on *Torts* (2d ed. 1955) 351.

The undisputed evidence here shows that the right respondents retained to control the fishing venture, the degree of their investment, their rights to participate in the profits of the venture, and the relative permanence of their relationship with the captains are entirely inconsistent with the conclusion that the captains and crewmen are not respondents' employees:

Control. Although no written agreement specified the extent of the respondents' right of control over the activities of their captains and crewmembers (R. 66, 91, 101, 332), the potential for and the right to

control is great. Even though the sea borne nature of the activity made moment-to-moment control impossible, respondents dictated the nature of the enterprise in a less direct manner. As with any employer selecting a supervisor, respondents chose captains whose honesty, integrity, and ability they could rely upon (R. 63, 90–92, 93, 319). Thus they greatly reduced the necessity to supervise personally. They determined the type of fish to be caught (R. 57, 75, 92–93, 126–127, 156, 317), the boats to be used by each captain (R. 62, 101, 122–124, 134–135), and the general geographic areas to be fished. (R. 92–93, 151, 162, 169, 319, 321.) Further, by completely outfitting the boats, short of foul weather gear (R. 57, 112–113, 156–157, 319, 328), respondents fixed the general method used to catch and haul the fish. Respondents in addition required that no intoxicating liquors be taken aboard the boats, established restricted areas which were not to be fished, and required the captain to keep the boat clean and properly moored while in port. (R. 116–117, 124, 325.) They issued pay scales for the crews, and placed restrictions on the size of the crew to be hired. (R. 96–99, 117–118, 164, 166, 171, 189–190, 206–207, 214–215, 323.) The boat owners required the captain to prepare payroll records and to distribute bi-weekly payroll checks based on that information. (R. 164–165, 188–189, 225–226, 250, 322, 327–329.)

Respondents, moreover, retained the ultimate right of control of the activities of their fishermen. As the trial court concluded (R. 333), the owners had the right to control the results of the operation, including

the right to interfere in the process to assure a proper result from the undertaking.

The respondents possessed one of the most crucial elements in the arsenal of control, the power to terminate the captains' or crews' jobs at any time and for any reason. Respondents could discharge a captain at the conclusion of any fishing trip, and trips generally lasted but a day. (R. 63, 67, 99, 100–104, 112, 252, 299–300, 320.) One of respondents' agent and officer, Styron, testified that a captain could be brought to task for improper treatment of the boat's equipment (R. 110), and relations with the captain would be severed when his actions aboard ship endangered life or property (R. 67). The captain could be fired for failure to secure an adequate catch, or for any reason—or without reason—at the owner's sole discretion. Styron also seemed to agree that an owner could require removal of a crewman. (R. 99–100).

There were indeed activities over which respondents exercised little or no control, such as recruitment of the crew and the fishing operations at sea (R. 92, 99–102, 108, 124, 153, 162–163, 178–179, 323–324). However, the lack of control exercised over those activities was dictated by the nature of the industry and peculiar rules pertaining to its operations. As a practical matter, a boat owner who remains ashore cannot exercise actual control over the details of an operation carried on miles away. But in this respect, respondents are no different from the owners or officers of many businesses. The captains' situation is not significantly different from the authority often given a foreman in an industrial plant, or the employment office in a branch or division of a large company. The

fact that the local manager, or one of his subordinates, has power to hire and fire, and within considerable limits, to fix duties and conditions of employment does not mean that the persons hired are the manager's employees rather than those of the company—whose headquarters may, in fact, be far away. The distant owner, who is surely the employer, retains control in the same sense and through the same mechanism as respondents—by establishing general requirements, providing the facilities, and hiring competent supervisory personnel. Rev. Rul. 69-315, supra.

Investment. The investment in the fishing enterprise was entirely respondents'. They provided the costly boats, the expensive nets, and all other equipment except foul weather gear. Respondents bought the fuel and paid for all repairs. (R. 57, 65, 110, 113, 156–157, 187–188, 300–301, 319.) The captains and crew had no investment in tools and facilities. They paid for their clothing and food, but then so do almost all employees. (R. 65, 109, 328.)

Share in the profits. The captains and crews had no opportunity to share in the profit or loss of the enterprise. They were paid on a piecework basis, and the rate was fixed at the inception of a fishing season. The piecework method of payment is entirely consistent with employment. *United States* v. *Silk, supra; Schwing* v. *United States,* 165 F. 2d 518, 521 (C.A. 3); VIII Encyclopoedia of the Social Sciences (1935 ed.) 678; Treasury Regulations on Employment Tax (1954 Code), Section 31.3121(a)–1(d). The fact that the fishermen received no compensation if they returned no catch is inherent in the piecework method, and does not place them in a position of suffering an

entrepreneural loss. Piecework is not the same as sharing in the profits and losses, because it does not involve the risks and opportunities of sharing in fluctuations in the market price for menhaden during a season. Price changes left the fishermen's remuneration unaffected. The only parties who were in a position to profit from such fluctuations were respondents and the processing plants (R. 96–99, 164, 180, 187, 197, 206–207, 225, 232, 235, 323, 326.)

Permanence of relationship. Although it was not formal, the relationship between the captains and the owners manifested a high degree of permanence (R. 122, 162, 174–175, 178, 213, 221, 231, 244, 262–263). The relationships, which ranged up to 40 years (R. 174) hardly are those of independent contractors. To be sure, respondents' relation with their captains is not as clearly delineated as in land based employment. But the activities in issue here must be evaluated in the context of this particular activity. The fact that captains and crews did not work year round and were "hired" anew at the beginning of each year is not necessarily probative of an independent contractor relationship. It merely shows that menhaden fishing is a seasonal business—much like clerking in a department store before Christmas. Indeed, in *Silk* this Court held that coal unloaders who do not work regularly or continuously were employees. The rationale is that the permanence of the employment of workers must be judged in the context of the particular undertaking. Here, it was economically unfeasible to retain the services of fishermen beyond the fishing season, since they could perform no useful services after

the season's end. During the season, the owners employed the device of a bonus which, in part, guaranteed continuity of service (R. 94, 96, 132, 138–140, 144–145, 190–191, 207–208, 226, 234, 326–327). And there are suggestions in this record that respondents, in order to retain the services of captains from one season to the next, employed a system of seniority in assigning captains to vessels. (R. 134–135, 166–167, 194–195, 210–212, 227, 236, 244–246, 253–254, 263, 266.)

III. THE COURT OF APPEALS APPLIED AN ERRONEOUS STANDARD OF REVIEW

The court of appeals declined to give plenary consideration to the arguments advanced in Part II of this brief. It treated this part of the case as essentially factual in nature, even though there is not now, and there was not in trial, any material dispute with respect to the underlying facts. For the most part, the parties stipulated to them. The testimonial evidence, which serves to reinforce and flesh out the stipulation, is free of significant contradiction. Thus the case involves a dispute over the ultimate conclusions to be drawn on the basis of undisputed evidence.[14]

[14] The only factual dispute in the court of appeals was over the district court's statement that the captains owned their catch of menhaden and sold it to respondents at the prearranged rate of pay. (R. 317, 320, 325, 329.) As we pointed out in our petition (p. 5), those findings are clearly contrary to the evidence. The court of appeals appeared to have corrected that error by concluding (R. 361) that the "* * * boat owners paid the captains at an agreed price per 1,000 fish caught and delivered".

To support its conclusion that it could not review "a pure question of law" the district court's conclusion that respondents are not the employers of the captains and crewmen [redacted], the court below held (R. 365):

> * * * under the rule of *Commissioner* v. *Duberstein,* 363 U.S. 278 (1960), a tax case, a reviewing court must affirm the district court unless it can be said that its basic findings were clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure. We find that there is ample evidence to support the finding of the district court. * * *

But neither of the cited authorities supports a restricted view of an appellate tribunal's function in a case of this sort. *Duberstein* did not state a standard of review applicable to every "tax case." The question was whether a certain transfer was a "gift," which Section 22(b)(3) of the Internal Revenue Code of 1939 excluded from gross income.[15] That is a problem involving to a considerable degree questions of subjective intent, and *Duberstein* itself recognizes that analogies and inferences from one tax provision to another are "dubious." 363 U.S. at 284. Here we have a statute whose language, purpose and history are entirely different from the one involved in *Duberstein,* so that the *Duberstein* decision cannot be applied here. See *United States* v. *Donruss Co.,* 393 U.S. 297, 308–309.

Rule 52(a) was also designed for other purposes. The "clearly erroneous" test applies to questions of fact which peculiarly call for determinations of credibility of witnesses, resolution of conflicting evi-

[15] Now Section 102(a) of the Internal Revenue Code of 1954.

dence, the drawing of inferences from circumstantial evidence, or the determination of state of mind or other subjective matters. These considerations would apply here only to the extent that the underlying facts are in dispute. Thus the "clearly erroneous" standard would apply in reviewing the district court's determinations of the lines of responsibility and duties and obligations entailed in the mutual relationship of owner, captains and crew. But once these matters are determined, what remains is a question of law subject to plenary review on appeal.

This case involves, to be sure, what has traditionally been called "mixed" questions of fact and law. This phrase is used to describe situations where the ultimate conclusion depends on a variety of factors, each of which may itself vary considerably from case to case. One example is a question that frequently appears in income tax litigation—the characterization of a sum of money as a debt or a contribution to the capital of a corporation. Other examples are the existence of probable cause, and the proper characterization of a railroad as "an interurban electric." [16]

All such questions involve multiple variables and there may well be confusion as to where the province of the finder of fact ends and legal analysis must begin. But this is not to say that the two functions are incapable of separation. "The history of appellate procedure shows abundantly the importance of separating the process of ascertaining the facts from ascer-

[16] See *Shields* v. *Utah Idaho Central R. Co.*, 305 U.S. 177; see, also, *Interstate Commerce Commission* v. *Union Pacific R.R.*, 222 U.S. 541, 547.

tainment of the applicable law and application of law to the preliminarily ascertained facts." V Pound, *Jurisprudence* (1959) 609. The desired approach was stated by Lord Mansfield in *Johnstone* v. *Sutton*, 1 T.R. 493, 545 (1786): "The question of probable cause is a mixed proposition of law and fact. Whether the circumstances * * * are true and existed, is a matter of fact; but whether, supposing them true, they amount to a probable cause, is a question of law." Far more recently, a panel of the Fifth Circuit other than the one which heard this case offered a comparable analysis of the debt-equity problem.[17] See, also, Weiner, *The Civil Nonjury Trial and the Law-Fact Distinction*, 55 Calif. L. Rev. 1020 (1967).

This is the approach that must be used here. The underlying facts—"the circumstances" to which Lord Mansfield referred—are for the trier of fact to determine. These comprise the terms and conditions, and the rights and the responsibilities, that the owners, the captains, and the crew receive or owe in relation to one another. But going beyond this determination, to the determination of the legal characterization appropriate to this bundle of rights and duties, presents a question of law. The sole question then is who, in the particular circumstances, is the employer, and that is without doubt a question of law.

This is demonstrated by *National Labor Relations Board* v. *United Insurance Co., supra.* The issue was whether "debit agents" were employees protected by the National Labor Relations Act or were instead exempted

[17] See *Berkowitz and Kolbert* v. *United States*, 69-1 CCH Tax Cases. 9398, pp. 84,634, 84,636-84,637.

"independent contractors." Although the Labor Act is phrased in different terms than the Social Security statutes, the purpose of the statute is (*id.* at 256) "to have the Board and the courts apply general agency principles"—*i.e.*, "the common-law agency test * * * in distinguishing an employee from an independent contractor." In discussing the governing standard, the Court said (*id.* at 258):

> There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor, and these cases present such a situation. * * * In such a situation as this there is no shorthand formula or magic phrase that can be applied to find the answer, but all of the incidents of the relationship must be assessed and weighed with no one factor being decisive. What is important is that the total factual context is assessed in light of the pertinent common-law agency principles. * * *

As for the standard of review, the Court added (*id.* at 260) that the Board's conclusion that the agents were employees "was not a purely factual finding * * * but involved the application of law to facts—what do the facts establish under the common law of agency: employee or independent contractor?" [18]

The propriety of plenary review on appeal is also

[18] The Court's decision (390 U.S. at 260) to accept the National Labor Relations Board's characterization even though a court might "as an original matter, decide the case the other way" is not an application of the "clearly erroneous" standard of review. Rather, we understand this result to depend on the practice of deferring to administrative rulings in appropriate circumstances. This approach should result in reversal here (see pp. 22–23, *supra*).

demonstrated by *United States* v. *Silk, supra* and *Bartels* v. *Birmingham, supra.* In *Silk* this Court indicated that a lower court's application of the common-law tests of employment to undisputed facts is reviewable *de novo* on appeal, and reversed, as legally erroneous, the trial court's conclusion that coal unloaders were not employees for Social Security tax purposes (331 U.S. at 716–718):

> Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the *Silk* case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the Act. * * *

And in reviewing the status of members of "dance bands" for the purposes of these tax statutes, this Court again, in *Bartels,* similarly treated the issue as one fully susceptible to review by an appellate tribunal, although there the lower court's conclusion was affirmed (332 U.S. at 132).[19]

[19] In *Bartels*, this Court held that musicians in name bands which performed short-term engagements at dance halls were not employees of the dance hall operators for Social Security Act purposes, but rather were employees of the band leaders. In reaching this conclucion the Court rejected the government's argument that, whatever the practicalities of control over the musicians, the contract between the leaders and the dance hall operators expressly stated that the operators were to have complete control of the musicians and that the contract should determine the legal issue of control.

This approach is supported by statements of the Congress when it amended the Social Security Act following the decisions in *Silk* and *Bartels* (see pp. 15–16, *supra*). The Senate Report accompanying the 1948 amendments said of the "common law" rules it adopted (S. Rep. No. 1255, 80th Cong., 2d Sess., p. 7):

> * * * And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act.

The necessary degree of uniformity cannot be achieved if these questions are treated as solely ones of fact, committed to the judgment of the trial judge or jury. By its approach the Fifth Circuit has made it impossible to administer the Social Security and unemployment statutes in an even-handed manner. This may best be shown by cases involving shrimp fishermen in Texas. Notwithstanding the complete identity of circumstances, the result to now has depended entirely on the fortuitous factor of the judgment of the finder of fact which hears each case. Compare *United States* v. *Crawford Packing Co.*, 330 F. 2d 194 (C.A. 5), with *Jackson* v. *Phinney*, 266 F. Supp. 835 (W.D. Texas). And this was recognized by the court below, which said in its opinion (Pet. App. A, p. 8a), "* * * courts have concluded, also on facts close to this case, that the captains and deckhands were employees. *Jackson* v. *Phinney*, 266 F. Supp. 835 * * *; *Kirkconnell* v. *United States*, 347 F. 2d 260 (Ct. Claims, 1965); *Cape Shore Fishing Company* v. *United States*, 330 F. 2d 961 (Ct. Claims, 1964); *Capital*

Trawlers, Inc. v. *United States,* 324 F. 2d 506 (1st Cir., 1963)." The uniformity which Congress predicted can be achieved only if this Court declines to follow the Fifth Circuit's limited view of the scope of the appellate review in these matters. As this Court observed in *United States* v. *Mississippi Valley Co.,* 364 U.S. 520, 526, "our reliance upon the findings of fact does not preclude us from making an independent determination as to the legal conclusions and inferences which should be drawn from them."

CONCLUSION

The judgment of the court of appeals should be reversed and the cause remanded to the district court with directions to dismiss the complaints.

Respectfully submitted.

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JUNE 1969.

APPENDIX

STATUTE AND REGULATIONS INVOLVED

Internal Revenue Code of 1954:

SEC. 3111. RATE OF TAX.

In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

(1) with respect to wages paid during the calendar years 1955 to 1959, both inclusive, the rate shall be 2 percent;

* * * * *

[26 U.S.C. (1952 ed., Supp. II) 3111.]

SEC. 3121. DEFINITIONS.

(a) *Wages.*—For purposes of this chapter, the term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

(d) *Employee.*—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

* * * * *

[26 U.S.C. (1952 ed., Supp. II) 3121.]

SEC. 3301. RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar

year 1955 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306 (c)) after December 31, 1938.

* * * * *

[26 U.S.C. (1952 ed., Supp. II) 3301.]

SEC. 3306 [as amended by Sec. 1, Act of September 1, 1954, c. 1212, 68 Stat. 1130]. DEFINITIONS.

(a) *Employer.*—For purposes of this chapter, the term "employer" does not include any person unless on each of some 20 days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was 4 or more.

(b) *Wages.*—For purposes of this chapter, the term "wages means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

* * * * *

(c) *Employment.*—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United

States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * * *

(17) service performed by an indivdual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except—

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register tonnage of merchant vessels under the laws of the United States).

* * * * *

(i) *Employee.*—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

* * * * *

[26 U.S.C. (1964 ed.) 3306.]

Treasury Regulations on Employment Tax (1954 Code):

§ 31.3121(a)–1 WAGES.

* * * * *

(b) The term "wages" means all remuneration for employment unless specifically ex-

cepted under section 3121 (a) (see §§ 31.3121 (a) (1)–1 to 31.3121 (a) (10)–1, inclusive) or paragraph (j) of this section.

(c) The name by which the remuneration for employment is designated is immaterial. Thus, salaries, fees, bonuses, and commissions on sales or on insurance premiums, are wages if paid as compensation for employment.

(d) Generally the basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework, or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually. See, however, § 31.3121 (a) (8)–1 which relates to the treatment of cash remuneration computed on a time basis for agricultural labor.

* * * * *

[26 C.F.R. 31.3121(a)–1.]

§ 31.3121(d)–1 WHO ARE EMPLOYEES.

* * * * *

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom services are performed the legal relationship of employer and employee.

(2) Generally such relationship exists when the persons for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important

factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

* * * * *

[26 C.F.R. 31.3121(d)-1.]

§ 31.3306(b)-1 WAGES.

* * * * *

(d) The basis upon which the remuneration is paid is immaterial in determining whether the remuneration constitutes wages. Thus, it may be paid on the basis of piecework or a percentage of profits; and it may be paid hourly, daily, weekly, monthly, or annually.

* * * * *

[26 C.F.R. 31.3306(b)-1.]

§ 31.3306(i)-1 WHO ARE EMPLOYEES.

(a) Every individual is an employee if the relationship between him and the person for

whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of § 31.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be

determined upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

* * * * *

[26 C.F.R. 31.3306(i)-1.]

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No. 63

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

UNITED STATES OF AMERICA,
Petitioner,

v.

W. M. WEBB, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AND APPENDIX FOR THE RESPONDENTS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 63

UNITED STATES OF AMERICA,
Petitioner,

v.

W. M. WEBB, INC., ET AL.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE RESPONDENTS

QUESTION INVOLVED

The concurrent decisions of two courts below held that respondents, owners of commercial fishing boats, were not liable for the payment of employment taxes[1] based on the earnings of fishermen (captains and crewmen) who operated the boats. The resolution of respondents'

[1] This consists of the excise tax portion paid by employer on the earnings of employees under the Federal Insurance Contributions Act (FICA), §§ 3121 et seq., Internal Revenue Code, 26 USC §§ 3121, et seq. It also includes the taxes paid on earnings when an employer has four or more employees under the Federal Unemployment Tax Act (FUTA) § 3306 et seq., Internal Revenue Code, 26 USC §§ 3306, et seq.

tax liability lies in the answer to the question: Were the fishermen operating respondents' boats respondents' "employees," as that term is defined by the provisions of §§ 3121(d)(2) and 3306(i), Internal Revenue Code, which specifically adopts the common law test for ascertaining the employer-employee relationship.[2]

STATUTES AND REGULATIONS INVOLVED

The pertinent portions of Sections 3121 and 3306, Internal Revenue Code of 1954 and Sections 31.3121(d)-1 and 3306(i)-1 of the Treasury Regulations on Employment Tax are printed in Appendix "A", *infra*, pp. 1A-8A.

STATEMENT[3]

Petitioner has stated the facts selectively, making fleeting references to a number of the Court's findings of fact and ignoring others. The abbreviated treatment of the district court's findings and the infusion of other facts not found by the Court below, but which petitioner says are compelled by the evidence, requires that the facts essential to a decision here be stated at length. In so doing, portions of findings included in petitioner's statement are necessarily repeated.

Each of the respondents, with the single exception of a partnership, was a corporation, organized under the laws of the State of Louisiana. (Fdg. 1 R. 315-316) Each respondent owned one or more menhaden boats and during the period involved was engaged in commercially fishing for menhaden, a non-edible fish. Respondents' business activities embraced (a) the ownership of menhaden fishing boats; (b) the fishing for menhaden under arrangements with captains on terms and conditions hereinafter set out and (c) the processing of menhaden into

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[2] *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 3.

[3] Record references to District Court findings of fact: (Fdg. —— R. ——); references to the record otherwise: (R. ——).

fishmeal products for later sale on the open market. (Fdgs. 2-7 R. 316-317)

There were several separate steps in the fishing and subsequent processing of fishmeal products before they were marketed. First, the respondent boat companies contracted with captains to gather the fish. To this end, the respondents furnished a boat equipped for fishing. A respondent-owner relinquished control of the boat to the captain who staffed and provisioned it as he saw fit without interference by the owner. In return, the captain agreed, without a guarantee of earnings of any kind, to make fishing trips for the season, return the catches to a plant designated by the owner and unload and sell his fish to the owner at an agreed price per catch. The respondent-owner would then contract with a processing plant for processing the fish purchased from the captain. The fish would then be processed into fishmeal and related products and sold on the open market. The proceeds from the sale of the end product were divided between the respondent and the plant operator after crediting the venture with expenses and the cost of the fish paid to the captain. The captain had no part in the further business arrangements between the plant operator and respondent-boat owner. (Fdg. 8 R. 317-318) It was part of the arrangement that the captain was responsible for keeping the boat clean, the engines in working order and while in port to keep the boat properly moored, watched and pumped out. The captain received no additional pay for this work, other than the proceeds from the sale of his fish catches to the respondent-owner as hereinafter described. All respondent-captain relationships were substantially the same. (Fdg. 28 R. 325)

The respondents' boats were operated from docking facilities owned by fishmeal processing plants. During this period respondents' boats operated from one or more processing plants located either on the Atlantic Coast or the Gulf of Mexico. Neither the respondent boat companies

nor the fish meal processing plants had a financial or proprietory interest in one another. Individual stockholders of some respondent boat companies may have had a stockholder's interest in some of the plant companies, but not in others. On the other hand, some stockholders of the plant operations had no interest in any of respondents' boat companies. All of the various entities, i.e., respondent boat companies and plant companies, were separate and distinct operations with respect to business matters transacted among them. (Fdg. 11 R. 318-319)

Respondents' boats were equipped by them and operated solely for menhaden fishing, and respondents paid for all repairs. After a boat had been equipped, a respondent would then select as a captain an experienced fisherman to whom the boat would be turned over for the purpose of fishing in the Gulf of Mexico or the Atlantic Ocean. It was understood that the fisherman to whom a boat was let would be its captain and he was so recognized by the respondents. An individual so selected was one in whose honesty and integrity respondents had confidence and trust in his ability to select, supervise and organize the crew of officers and hands to operate the boat and conduct successful fishing operations. (Fdg. 12 R. 319)

The arrangement between the respondents and each captain was oral. Although the term was not specified, it was understood to persist for a fishing season. It could be terminated by either party voluntarily or involuntarily at the conclusion of any trip during a season. This could occur only when a boat was in port and before another fishing trip was commenced. While the arrangement could be so terminated, custom and practice was for it to be continued for the season. (Fdg. 13 R. 320) There was no evidence of termination of any relationship or contract during a season. Ordinarily a captain completed a fishing season before leaving the boat for any reason. But if fish were scarce and the captain could not keep his crew,

a captain would have to terminate the arrangement before the season was over. Termination may also result during a season by reason of the captain's ill health. A respondent may have terminated relations and declined to give a boat to a captain who was unable to produce adequate catches of fish during a prior season. A captain had a right to, and did, contract with respondents' competitors or with a respondent boat owner other than the one whose boat he fished for a prior season. (Fdg. 47 R. 333)[4]

While not formalized by the parties, the arrangement between respondents and the captains constituted an oral contract pursuant to which a captain used a boat belonging to a respondent to go out to fishing grounds and by his own means and methods make catches of menhaden and return them to a designated processing plant for unloading and sale to the respondent at an agreed price per unit of measurement. A respondent's interest in the arrangement was to obtain the largest quantity of fish possible, delivered to a designated processing plant. Respondent in no way interfered with the captain as to the manner and method of accomplishing this result. (Fdg. 15 R. 320-321)[5]

Although the respondents decided the general area to fish, the seasonal presence of the menhaden in a particular area was the determining factor whether the fishing would take place in the Atlantic Ocean or Gulf of Mexico. If there was an option of two places to fish, the captain's preference where to fish was a factor in the joint decision between him and the respondent boat owner. (Fdgs. 16 and 17 R. 321)

Some captains, by choice, fished only in the Atlantic Ocean, others only in the Gulf of Mexico area. Some fished in both areas for consecutive seasons in a single

[4] Pet. Br. p. 4 modified this finding materially.

[5] Petitioner avoided reference to most of this finding.

year, while others fished a single season for the respondents and for competitors at other times. Some captains contracted seasonally with several respondents for the use of their boats over a period of years. There was no pattern of continuity of relationship between particular captains and particular respondents. (Fdg. 18 R. 322) There was nothing in the arrangements between respondents and the captains which assured or guaranteed the captain the particular use of a particular boat or in fact any boat beyond a single fishing season, nor were the captains bound to accept a boat offered by particular respondents once the season ended. Each season was the subject of new and separate negotiations between respondents and the captains. (Fdg. 19 R. 322)

The commencement and termination of a season was a separate and complete arrangement and was so considered by respondents and the captains. All arrangements were understood to be on a season-to-season basis. A new and complete set of personnel and financial records were instituted for each boat for each new season and maintained by the processing plant from which a boat operated during the season. The opening of the processing plants determined the commencement date of a particular season. (Fdg. 20 R. 323)

The respondents during this period determined that a crew of 24 men was necessary for successful fishing. But each captain determined the qualifications of, and selected, his crew which, in this period, consisted of three officers, a cook and 20 net handlers. The captain, in his discretion could and did vary this number, but seldom did because the additional cost would be deducted from his compensation. He sometimes sailed with less than 24 crewmen, but did not without consulting with the respondent-owner. (Fdg. 21 R. 323)

In negotiations for a captain's services, it was understood that the captain would select the crew members. Prior to commencement of a new season, the respondent-

owners would furnish the captains with a pay scale for crew members, and the crew size for the season. If a bonus was to be paid for a season, this information was furnished the captains.[6] (Fdg. 22 R. 323)

Although respondents did furnish a pay scale and a statement respecting crew size to the captains, there was flexibility left with the captains to raise the pay of a particular crew member if he desired, by lowering his own level of compensation. (Fdg. 23 R. 324)

Each captain to the exclusion of the respondents had full charge of his crew and determined such matters as (a) when to depart from port for a fishing trip; (b) when to return; (c) where to fish (that is, the fishing grounds to work); (d) when to fish; (e) how to fish (that is, the actual, mechanical process of putting out the nets, purse boats and other gear); and of all other matters concerning the operation, maintenance and fishing of the boat from the time of departure until its return to unload the catch. The crew took their orders from the captain exclusively. (Fdg. 25 R. 324)

At the completion of a trip, the captain would prepare for another as soon as practicable after unloading. It was to the interest of the parties, as well as the processing plants, to keep the boats fishing as often as practicable. But a boat would remain in port, if in the captain's judgment it was unseaworthy or needed repairs or new nets, or if he considered the weather conditions were unsuitable for fishing. These were left to the captain's discretion. (Fdg. 40 R. 330)[7]

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[6] While not delineated by the Court, it was clear from the evidence that respondents and the captains considered this publication a safeguard against shifting between crews once a season started. "We tried to produce harmony". (R. 96-97, 98). Bonus were set to keep men from moving from boat to boat." (R. 131) All boats at a plant paid the same scale. "If one man was fishing on one boat and getting more than others, why, that would cause a disturbance, naturally." (R. 198)

[7] Petitioner overlooked the essence of this finding.

Respondents had no right to, nor did they attempt to, instruct a captain or crew as to their actual fishing activity, or how to accomplish it. (Fdg. 27 R. 325)[8] There was no express agreement specifying the extent to which respondents had control over the fishing activities of the captains. It was clear that no actual control was exercised over the details, manner or methods employed by the captains and their crews. (Fdg. 44 R. 332)[9]

Respondents did have the right to control the results of a captain's work and interfered in the process to some degree to assure a proper result from the undertaking. (Fdg. 46 R. 333)[10] The respondents had no control over the crewmen, nor did they exercise any control over the latters' activities through the captains. (Fdg. 49 R. 334)[11]

At the outset of each season, the respondents and the captains who used their particular boats negotiated a price at which respondents would purchase and the captains would sell their catches of fish delivered and unloaded at a designated fish meal plant. (Fdg. 29 R. 325) Payment was made at an agreed rate per unit, i.e. each 1000-fish caught and delivered. (Fdg. 30 R. 326) There was no guarantee of any kind regardless of time or effort expended. Unless a captain caught fish to sell to the respondent, he and his crew had no earnings. (Fdg. 31 R. 326)

The price paid per 1000-fish differed with the seasons and among the various respondents in their separate negotiations with the captains. But the price usually remained constant during a season, irrespective of fluctuations in marketability of the fish meal products produced. (Fdg. 32, R. 326)

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[8] No reference was made to this finding.

[9] *Ibid.*

[10] Petitioner's brief distorted this finding. (Pet. Br. p. 7).

[11] No reference was made to this finding.

In addition to the price agreed upon and paid per 1000-fish unit, respondents agreed to pay a captain an additional amount as a bonus which was small in relation to the price paid per unit. It was payable only at the conclusion of a fishing season. The amount varied seasonally among the respondents and the various captains according to the total number of fish caught in the entire season. The bonus was divided at the close of the season among the crew in such amounts as the captains and their respective crews negotiated. It was based on the number of fish the particular crewman helped to catch. The respondents had no right to interfere in the negotiations between the captains and crewmen. The bonus served two purposes: First, it stood as a reward or an incentive for the crew to exert greater efforts to increase the size of fish catches, and second, it aided a captain to induce crew members to remain with the vessel to the end of the season to realize the additional money. (Fdg. 33 R. 326-327)

The captain decided how much fuel and groceries to take aboard. Fuel consumed was paid for by the respondent. Groceries were purchased by the captain at a store of his choice and either paid cash or charged them to the boat whereby a bill therefor would be sent to the respondent. At the time of settlement the amount charged against the boat and paid for by the respondent for groceries was deducted from the price paid the captain for the latter's catch of fish. The crew also provided their own personal gear, such as foul weather clothes, boots and other wearing apparel, in keeping with a long-standing custom in the fishing industry. (Fdg. 35 R. 328)

The respondent did not know who the crew members would be at the time they and the captains made their arrangements. Respondents had no record of any crewman's identity until they filled out forms listing them on respondents' records for tax requirements or until the

captain filed his first bi-weekly payroll record with a particular plant. (Fdg. 34 R. 327) The captain kept a daily payroll record of the amount to be paid to each crewman out of the proceeds paid the captain for a particular catch of fish. This daily record reflected who comprised the crew for each catch, the rate paid to each man with variations (if any) to the same man and the number of 1000-fish units of participation in the catch. There was deducted from each crewman's share his portion of the cost of groceries and personal gear charged against the boat, together with any advances made against earnings. The captain turned over this payroll information bi-weekly to the processing plant. The plant's office compiled the captain's data into a single payroll sheet, showing the amounts due the captain and each crewman bi-weekly. Checks were issued by respondents to the captain and each crewman in such amounts as the captain, the respondent and each crew member agreed upon. The checks were delivered to the captain who, in turn, distributed them to the crewmen. If the total amount distributed exceeded the amount a captain received from a respondent for the sale of his catch, the respondent paid no additional amount; the excess was paid out of the captain's pocket. (Fdg. 37 R. 328-329)

Personnel turnover in the crews varied among the boats. Factors determining turnover and relative stability among the crews depended largely upon the captain's ability as a fisherman. The respondents reserved no right to interfere in these matters, nor attempted to do so. (Fdg. 34 R. 327)[12]

Each time and at the time a boat returned to port for unloading at a plant, the trip was over and the work of fishing on that trip was concluded. The captain was then in possession of the catch, which was owned by him

[12] No reference was made to this finding.

and which he agreed to sell to respondents at an agreed price per unit of 1000-fish. (Fdg. 38 R. 329)[13]

During this period the boats were not refrigerated.[14] Fishing trips, particularly in the Gulf of Mexico, usually lasted a single day. The fishing was done in the vicinity of a fish processing plant so that the day's catch could be unloaded readily to avoid spoilage of the fish. Occasionally fishing trips off the Carolina coast in the fall or winter seasons lasted several days where a catch was small and the weather was cold enough in the captain's judgment to preserve the quality of the fish already caught. The boat would then continue fishing until it could return with a large cargo of fish for unloading and sale. Menhaden being very perishable, it was to the interest of the captains and the respondents therefore to unload and make immediate disposition of the catch upon reaching port. (Fdg. 39 R. 330)[15]

If a particular trip in the season was unsuccessful, known in the trade as a "broker", and the value of the catch was insufficient to cover the captain's portion of the expenses of a trip, the captain's portion of expenses would be carried over to succeeding trips to be deducted from the price of the fish paid the captain for subsequent catches. The unpaid expenses were regarded as a personal obligation of the captain. However, if the captain's portion of expenses for groceries charged to the boat was unpaid at the close of the season, the respondents usually paid it. But if bonus money was due the captain, it was sometimes used to pay any outstanding grocery bill. (Fdg. 42 R. 331)

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[13] Petitioner disagreed with this finding. (Pet. Br. p. 31, fn. 14)

[14] In recent years refrigeration has permitted boats to remain at sea until a captain decided his catch was adequate for unloading. (R. 195)

[15] Petitioner's Brief omitted a pertinent portion of this finding. (Pet. Br. pp. 6-7)

The respondents' boats were equipped with radios through which the captains maintained contact with each other while fishing to aid in finding the schools of menhaden fish. The respondents did not interfere in the captain's use of the communications facilities. The processing plants furnished airplanes and pilots to the venture as spotters and observers to assist the captains in locating schools of fish. Radio communications between the planes and respondents' boats were maintained for this purpose. The captains had the right to accept or reject this service and to exercise their own judgment as it best served their interests. No charge for the plane spotter service was made to the respondents by the plants. (Fdg. 45 R. 333)[16]

The respondents had no agreement with the captains which entitled them to a preferred call on all the time and services of the captains. (Fdg. 48 R. 333)

The District Court concluded that the facts did not constitute a taxable employer-employee relationship under the provisions of the applicable statutes and Treasury Regulations. (R. 335-337) The Circuit Court of Appeals affirmed unanimously. (R. 357-365)

SUMMARY OF ARGUMENT

The Federal Insurance Contributions Act (FICA), the Federal Unemployment Tax Act (FUTA) and the Self-Employment Compensation Act (SECA) are the tax sections of the Social Security Act. To determine the respondents' tax liability, the existence or absence of an employer-employee relationship between the fishermen and the respondents must be ascertained. In determining that the relationship was not that of employer and employee, the two courts below used the common law definition of "employee".

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[16] Pet. Brief p. 6 fn. 5 omits the captains' exercise of discretion.

The Congressionally accepted distinction between an employee and an independent contractor in service relationships exist when the individual for whom services are performed has the right to control and direct the other who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which it is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. Generally, if an individual is subject to the control or direction of another, merely as to the result to be accomplished by the work and not the means and methods for accomplishing the result, he is an independent contractor. Other factors, characteristic of an employer, but not present in every case, are the right of discharge, the furnishing of tools, and a place to work to the one who performs the services. 26 CFR § 31.3121 (d)-1(c), Appendix "A", p. 7A.

The petitioner endorsed Congress' definition of the "usual common law rules" for determining "employee" status in the early part of the Brief. However, it was abandoned later, in favor of criteria giving vitality to the remedial purposes of legislation governing employment relationships which determine liability in maritime and workmen's compensation cases. Both latter concepts are in derrogation of the common law; neither are relevant for making determinations of respondents' tax liabilities under the Internal Revenue Code.

This novel theory was served up as a device to avoid confrontation with the impressive legislative history of the statutes involved which, standing alone, destroys petitioner's theory for transposing self-employed fishermen into colorable "employees" based on their calling as seafarers.

The lure invoking this Court's creative powers to effect the transformation was, in a large measure, petitioner's promise to expose the Circuit Court's decision below as a

vehicle for denying social security benefits to the fishermen. In addition, petitioner contended that the Circuit Court's decision caused dilemmas impairing the agencies' ability to administer the tax aspects of the Act in an even-handed manner.

The petitioner was apparently unaware that the decision below accorded the fishermen, as self-employed persons, the same benefits under the Old Age, Survivors and Disability Insurance (OASDI) program that are accorded common law employees. Also overlooked was the assurance of the Commissioner of Internal Revenue to Congress in 1949 that the agencies were then prepared and equipped to administer the tax sections of the Social Security Act in an even-handed manner whether the taxpayers were common law employees or self-employed persons.

But somewhere between the Petition and petitioner's Brief here on the merits, those promises and contentions dissolved. Permitting form to rise above substance, all that remains is a scholarly brief undertaking to shift tax incidence from one group (the fishermen) under the Self-Employment Compensation Act (SECA), to another group (the fishermen and respondents combined) under the Federal Insurance Contributions Act (FICA), for no apparent reason other than to suit the tax collector's administrative convenience.

I

The legislative history of the Social Security Act from its inception in 1935 to the present, demonstrates a continuous struggle between the proponents of extended coverage and the opponents of change who would limit coverage to common law employees as the Act originally intended. The technical definition of "employee", according to the common law rules, separated many from the Acts' benefits although need was demonstrated. This led to considerable benevolent administrative cleverness

by the agencies who undertook to create colorable employees out of those in the twilight zone between clear employment and entrepreneurial enterprise. Some courts overlooked the common law distinction drawn in the Act and considered only the economic factors involved and the remedial aims and purposes of the statute in deciding the existence or absence of the employment relationship.

The Congress reacted sharply to what it considered a usurpation of its legislative function by the courts and administrative agencies. In 1948 Congress reiterated its unbroken intent that coverage was to be limited to "employees" so defined by the specific terms of a new statute embodying the "usual common law rules". The Congressional debates and Committee reports showed an emphatic rejection of the "economic reality" concepts which had evolved, but there was a ready approval of those decisions which were based on the common law concepts outlined in the Treasury Regulations. Litigation continued to swirl around the term "employee". The proponents of coverage urged its expansion or repeal while the opponents stood firm on the common law test as controlling.

Ultimately, in 1950, the proponents of expanded coverage won the day. By legislative compromise, many groups of non-employees were legislated into the FICA as "statutory employees" and the self-employed were covered into the system by enactment of the SECA. No one, under any theory, was separated from benefits. However, the common law distinction between "employees" and "independent contractors" remained intact. Insofar as benefits coverage is concerned, the difference is no longer significant, but the tax incidence is another matter.

In 1967, the Treasury Department was unsuccessful in its efforts to convince Congress to legislate fishermen into the category of "statutory employees" under the

FICA. Resort to these proceedings intend that this Court should undertake what Congress refused to do.

II

Petitioner argues that Congress intended that fishermen be considered employees under the Social Security Act if they were held to be employees under principles of maritime law. The legislative history of the Social Security Act lends no support to petitioner's theory.

Petitioner observed that the fishermen were entitled to maintenance and cure from the respondent-boatowners by virtue of their status as seamen. From this obligation there arose an employer-employee relationship according to the principles of maritime law. In this posture the petitioner insists that the determination having been made under one law, it should be mechanically carried over into the Internal Revenue Code where it must be interpreted the same way, although the tax statutes involve significantly different considerations and legislative purposes. The novel theory proposed cannot withstand analysis. Nothing in the pertinent tax statutes' background, history, terms or purposes indicates that the term "employee" for tax purposes is to be evaluated according to the determinants applied by the admiralty courts when resolving rights to maintenance and cure.

The Circuit Court below recognized that a realistic application of the common-law tests did not require that the relationship of the owners and the captains and crews be evaluated under principles of general maritime law. The decision recognized the gulf between the standards for determining employer-employee relationships under maritime concepts as opposed to tax considerations under the Internal Revenue Code. The Circuit Court found the captains and crewmen were not the owners' employees when applying the common-law test for tax purposes, but would be their employees under the liberal tests applied to promote the remedial purposes of maritime law.

The sole issue here is whether the fishermen were employees within the meaning of the pertinent tax statutes and not within the meaning of other legislation.

It is generally understood that one may be an "independent contractor" under the common law control test and at the same time may also be an "employee" under remedial legislation relating to maritime or workmen's compensation.

Since 1950, no social or economic purpose under the statute is served by extending the term "employee" beyond the limits fixed by Congress simply to label these self-employed fishermen as employees. Questions respecting inclusions and exclusions in making these determinations are for the Congress to answer not the courts or the executive agencies. Petitioner's evaluation of employer-employee relationships "according to the standards that have been traditionally applied in the context of a particular industry" provide no stated rule by which respondents and others may determine their tax obligations under the Act. Petitioner has shown no logical basis for cross-fertilizing maritime principles with the provisions of the Internal Revenue Code to support its novel contention. The basic purpose for which the definition of employee is used in maritime law is entirely different from the common law purpose.

III

The District Court and the Circuit Court of Appeals applied the conventional common law rules in the statutes and regulations to the findings of fact and concluded that the captains and crewmen on respondents' boats were not respondents' employees for purposes of the Social Security Act. The case presents no constitutional principle so closely connected to the facts of the case to warrant dispensing with the conventional rule of this Court which usually precludes review of the concurrent findings of two courts below.

The findings below, amply supported by the evidence, disclosed an oral contract between the respondent-owners and captains under which the former relinquished control of their boats to the captains. They in turn staffed and provisioned the boats at their own expense, with the understanding that all fishing activities conducted by the captains were to be free from the direction and control of the respondents. The captains made business decisions and each season bilaterally negotiated the price for the sale of fish catches to the owners on delivery. All matters relating to crew hire, hours of work and areas to be fished were the sole prerogative of the captains. All payments to the crew and the cost of provisions and personal gear charged against the boat were the captains' personal debts. Like other independent contractors, a captain's profit or loss depended upon the way he combined efficiency and economy in managing his vessel. There was no guarantee of earnings to the captains and crewmen of any kind irrespective of the time or effort expended. The captains' contract was to produce a specified result. The will of the respondents throughout was represented only in the results of the work not in the means by which it was accomplished. The captains exercised independence and opposed the wishes of the boat owners by affecting changes respecting the crew size and pay scales determined by the respondents. They were unrestricted in their right to conduct similar fishing operations for other boat owners anywhere. There was no right of indiscriminate discharge contemplated or exercised by the parties. The covenants between them constituted an undertaking capable of independent action to be judged by results covering a fishing season. The parties recognized and the record supported the conclusion that each captain was an independent operator, each with an organization of his own, conscious of his own power to direct operations and negotiate the sale of his product.

Petitioner's emphasis on the captains' use of the expensive vessels owned by the respondents as decisive here, loses its force when it is realized that there are many contractual arrangements involving large investments by businesses with little or none by the independent contractor performing necessary services.

While contending the facts were undisputed, and as such called for an opposite result, the petitioner disparaged nearly all the findings made by the two courts below and raised questions whether the evidence sustained the Courts' findings. Ignoring the requirements of Rule 52(a) F.R.Civ.P., the petitioner contended, in effect, that the Courts ignored all of the facts the petitioner deemed significant.

Petitioner's contention that the issue here was basically a question of law, subject to plenary review, is without support in the legislative history or plain words of the statutes and regulations. Furthermore, the decisions of this Court have uniformly considered the determination of employer-employee relationships a matter for the triers of fact.

ARGUMENT

I

INTRODUCTION

a. Whether an individual is an Employee or an Independent Contractor, the effect of the relationship between the tax sections and the benefit sections of the Social Security Act is the same—they emphasize the underlying purpose of the legislation, i.e. the protection of its beneficiaries from some of the hardships of existence.

At its inception in 1935 the Social Security Act covered about half of the labor force. Today, it applies to nearly 90% of American workers.[17] By now, as might

[17] See, Broden, *Employment Relations under Social Security*, 33 Temple L.Q. 307.

be expected, the basic rules applicable to benefits coverage and assessment of corresponding tax liabilities are and should be settled. Yet, in one important area of the Social Security law this is not true. It deals with the special rules applicable in determining the employer-employee relationships, under the Act's benefits sections and the coordinate sections of the Internal Revenue Code, in the deepening twilight zone lying between what is clearly an employee on the one hand, and an individual entrepeneur on the other.

In the beginning, the Social Security program provided for benefits allowances for "employees" only. This excluded, of course, all self-employed persons and those in a class with independent contractors. In making coverage determinations much skirmishing in the courts and executive agencies took place within the area between employees and self-employed persons or independent contractors.

Thus, if one was considered an employee, the liability for the taxes concerned was divided equally between the employee and the party hiring him and, additionally, the worker was entitled to old age insurance benefits under the program. On the other hand, if he was an independent contractor, none of these legal consequences ensued.

In 1950, self-employed persons and independent contractors were brought under the coverage of the program so that now the above distinctions are less meaningful. In all material respects the self-employed or independent contractors became entitled to the same benefits under the social security program as the employee. Only one difference remained: The employee's tax contribution is less than the independent contractor's, and, from the view of the employer, there are no employment taxes imposed if the hired party is classified as an independent contractor.

Prior to the coverage of the self-employed into the social security system, those administering the Act tended to liberalize the "employee *vs.* independent contractor" concept, leaning toward "employee" coverage for those in the twilight zone. Faced with a regulation defining "employee" in legalistic terms, an administrator might consider such regulation a technicality if it would deny coverage. This human reaction found support in a number of court decisions, giving rise to opposing results in "close" cases.

The aims and purposes of the Social Security Act were to insure a measure of economic security in old age to as many as the law permitted. Those benevolent purposes reached fulfillment in 1950 when Congress covered the self-employed into the program. No one,[18] under any interpretation of the Act, is separated from benefits allowances. It is now a tax matter: Who pays the tax? Shall it be shared by the employer and the hired person, or shall the hired person pay his own tax to qualify for his benefits?

As matters stand and as they stood in 1956, the period involved here, common law employees under the Federal Insurance Contributions Act (FICA)[19] and the self-employed under the Self-Employment Compensation Act (SECA)[20] were and are accorded the same benefits under the Old Age, Survivors and Disability Insurance (OASDI) program and hospital care (Medicare). The fishermen, under the decisions below, obviously qualify as self-employed persons under SECA. We attach importance to this owing to an inaccurate statement in the govern-

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[18] Subject to exempt occupations listed at § 3121(b) and 3306(c), Internal Revenue Code.

[19] §§ 3121 et seq., Internal Revenue Code, Appendix "A" pp. 1A-2A *infra*.

[20] §§ 1401 et seq., Internal Revenue Code, see Appendix "A" p. 8A-9A *infra*.

ments' petition for the writ of certiorari. There it was indicated that:

> "[T]he Social Security Administration, in paying social security benefits, is faced with a difficult situation. It must have a consistent nation-wide policy. The geographic location of an applicant or his work cannot be a basis for *denying benefits.* Thus, the agency had to make a decision of whether to deny benefits to all fishermen or to give such benefits to the entire class. The agency has resolved this dilemma by paying the entire class of workers the benefits regardless of the geographic area in which they perform their services. As a result some people now receive benefits free of any corresponding burden on them or the owners of the boats on which they have worked. * * * But it does, in relation to hundreds of owners and fishermen involved, impose an inequity that presently may be resolved only through review by this Court." (Petition pp. 15-16) (Emphasis supplied)

The suggestion that the decisions below caused inequities, or payment of benefits without collection of taxes, or formed a basis for denying benefits to fishermen, lacks substance. These contentions, whatever their purpose was intended to serve in the petition, were omitted from petitioner's brief here on the merits.

Owners of vessels and mariners generally are unconcerned with proceedings under these statutes. Their employment status under the common law rules is clear. Only the contractual arrangements existing between some fishing boat owners and commercial fishermen, which fall somewhere between employer-employee relationships at common law, and independent contractor, are contested.

b. The sole basis for determining respondents' liability for FICA and FUTA taxes was whether the fishermen on respondents' boats were "employees" according to the criteria contained in the Treasury Regulation implementing §§ 3121(d) and 3306(i), Internal Revenue Code.

The only question here is whether the two courts below reached a proper decision by the application of §§ 3121 (d) (2) and 3306(i), Internal Revenue Code, to the facts. Both acts "specifically adopt the common law test for ascertaining the employer-employee relationship." *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 3. Turning to the applicable legal principles, it is agreed, of course, (Pet. Br. pp. 13, 14, 17) that under the common law test prescribed by the statutes in question, the relationship of employer and employee exists where the principal has the right to direct the manner and method in which the work shall be done, as well as the result to be accomplished, while an independent contractor relationship exists where the individual who performs work for another does so according to his own manner and method, free from direction or right to direction in matters relating to the performance of the work save as to the result. *Railroad Co.* v. *Hanning*, 15 Wall. 649, 656. *Singer Mfg. Co.* v. *Rahn*, 132 U.S. 518, 523.

Thus, the applicable Treasury Regulations which are an authoritative elaboration of the distinction under the common law test between an employee and an independent contractor provide the answer. In pertinent part they state [26 CFR § 31.3121(d)-1]:

> *Who are employees.*
>
> (a) * * *
>
> (c) *Common law employees.* * * *
>
> (2) Generally such relationship [employer-employee] exists when the person for whom the services are performed has a right to control and

> direct the individual who performs the services, not only as to the result to be accomplished by the work, but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done, but how it shall be done. In this connection it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.
>
> * * * *
>
> In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor."
>
> [The full text is at Appendix A, pp. 4A-6A *infra.*]

Petitioner agrees that the control factor is of paramount importance in deciding who are "employees" under the sections. (Pet. Br. p. 17) Also significant, but not necessarily present in every case, are three additional factors: (1) the right of discharge, (2) the furnishing of tools and (3) the furnishing of a place to work to the one who performs the services. 26 CFR § 31.3121(d)-1. Beyond these criteria the Regulations are silent. Additional factors listed in many decisions are: degrees of control, opportunities for profit or loss, investment in the facilities, permanency of the relation and skill required. *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 3.[21] Since the inception of the Act, these criteria have been applied by the several federal courts and the Commissioner of Internal Revenue to numerous service rela-

[21] In the absence of congressional expression to the contrary, these and any others must be considered descriptive of the criteria in the existing Regulation as they affect control of the manner and method of performance of the work.

tionships in varied occupations.[22] The contrary results reached in what appeared to be similar situations were in no small measure due to differences in facts and the weight accorded them by the trier of fact.

The petitioner's notions of the evaluation of the employer-employee relationship "according to the standards that have been traditionally applied in the context of a particular industry" (Pet. Br. p. 21) may be weighty when enforcing rights or invoking remedies under the particular laws or precedents regulating such industry. But in the absence of the industry's own definition of "employee", petitioner's "standards", undefined, are meaningless. Unless those "standards", whatever they may be, coincide with Congress' definition of "employee" according to the common law test provided in §§ 3121(d) and 3306(i), Internal Revenue Code, and the implementing Treasury Regulations (Appendix A, pp. 4A-6A), then such "standards" are without significance in determining tax issues. Petitioner has delineated no criteria defining "employees" apart from those in the statutes and Regulations involved here.

In the early part of its brief, petitioner abstractly endorsed Congress' definition of the "usual common law rules" in the statutes and regulations involved. (Pet. Br. p. 13-14). But instead of relying on it, petitioner adopted other criteria as controlling, i.e., principles which determine liability growing out of employment relationships in maritime and workmen's compensation cases. (Pet. Br. 13, 18, 25-26). The tests in both of those categories are in derrogation of the common law. By this device, petitioner seeks to divert attention from the statutes' revealing legislative history, [glossed over in a footnote, (Pet. Br. 15, ftn. 7)] which discards peti-

[22] The annotations in the current Unemployment Insurance Reporter (CCH, ¶ 10,416) disclose uniform application of the statutes and Regulations as the sole test for making the determinations in hundreds of cases.

tioner's novel theory. The legislative history is discussed *infra*, pp. 27-46.

Petitioner labels this concept the "common law of the sea" (Pet. Br. p. 17), perhaps to bring it in line with the term "usual common law rules" contained in the statutes. But the similarity ends in the names. This Court has cautioned against the use of word games in important matters, saying:

> "Catchwords and labels, * * * are subject to the dangers that lurk in metaphors and symbols and must be watched with circumspection lest they put us off our guard." (*Henneford* v. *Silas Mason Co.*, 300 U.S. 577, 586)

Consideration of the questions raised make necessary an examination of the legislative history of the terms, "common law rules" and "employee" contained in §§ 3121(d) and 3306(i), Internal Revenue Code. This history will demonstrate (1) that it was Congress' unbroken intent that the control test was basic to the definition of "employee" in applying the "common law rules" to service relationships; and, that attempts by the Treasury Department and courts to infuse other criteria to extend the meaning of that term were emphatically rejected;

(2) that the applicable sections of the Social Security Act and the Internal Revenue Code make no distinction between an employee for purposes of a tax case involving maritime personnel and any other type of employee, and no distinction was intended; and,

(3) the necessity for invoking an "economic reality" concept prevalent in the early decisions of this Court [23] favoring "employee" status to give coverage where needed, has all but evaporated leaving the issue solely a tax matter.

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[23] *United States* v. *Silk* and *Harrison* v. *Greyvan Lines, Inc.*, 331 U.S. 704 (two cases) and *Bartels* v. *Birmingham*, 332 U.S. 129.

Legislative History

c. When the Social Security Act was adopted in 1935 it set forth no specific definition of the term "employee".[24]

(i) *1935-1938: The Social Security Act limited coverage. The Treasury Department's definition of "employee" promulgated in 1936 by the Regulation remains virtually unchanged today.*

When the Social Security Act was passed in 1935 [25] its aims and purposes were benevolent, but its coverage was limited. The term "employment" in the Act was defined broadly as "any service of whatever nature performed within the United States by an employee for his employer." [26]

There followed a list of occupational categories exempted from coverage, one being maritime personnel.[27] Respecting the scope of the Acts, a congressional Committee report observed: "While humanely providing for those in distress, it does not proceed upon the destructive theory that the citizens should look to the government for everything. On the contrary, it seeks to reduce dependency

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[24] A large part of the legislative history central to this discussion is contained in Senate Rept. 1255, 80th Cong. 2nd Sess. A reprint of the Committee Report in 2 U.S. Code Congressional Service and Administrative News (1948) has been reproduced in full for convenience as Appendix B of this brief, *infra*. The original pagination of the reprint has been retained, which commences with p. 1752 and ends with p. 1775. Any reference made to Senate Report No. 1255 will be designated as (Sen. Rept. No. 1255, see Appendix B, p. ——)

[25] 49 Stat. 620, c. 531; 42 USC, generally disbursed throughout Title.

[26] 49 Stat. 620, 625, § 210(b).

[27] 49 Stat. 620, 625, § 210(b)(4) [exempted from coverage] "Services performed as an officer or member of the crew of a vessel documented under the laws of the United States or of any foreign country * * *." The House Report noted that maritime services were exempt from coverage. H. Rept. No. 615, 74th Cong. 1st Sess. pp. 21-22.

and encourage thrift and self-support." H. Rept. No. 615, 74th Cong. 1st Sess., p. 16. The Senate Finance Committee observed: "A considerable part of the population, however, is outside of Title II (Old Age, Survivor's and Disability Insurance [OASDI]) * * * These groups include almost half of all persons 'gainfully occupied' as this term is used in the United States Census." [28]

At the same time, the Act set forth no definition of the term "employee"; Section 1101(c)(6) of the Social Security Act merely specified that it "includes an officer of a corporation." [29]

Little difficulty was experienced in separating clear employment from conventional entrepreneurial activity. However, there were a multitude of other borderline occupations that Congress could not and did not foresee. It was the responsibility of the administrative adjudicatory processes of the Social Security Board and the Treasury Department to pass upon these initially. At the time the Social Security Act was adopted there was no doubt that "employee" had its usual common law meaning.[30] To facilitate the uniform settlement of these disputes, the Treasury Department promulgated regulations (which were substantially the same as the present regulations) interpreting the statutory term "employee" on the basis of the common law control test.[31]

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[28] S. Rept. No. 628, 74th Cong. 1st Sess., p. 9. The Report continued: "Included in this excluded group are all agriculture workers, domestic servants, employees of charitable, educational and religious organizations, all self-employed persons, farmers, professional people and proprietors and entrepreneurs. * * * Many of these people will not be so greatly in need of old age assistance as the industrial workers to whom Title II is applicable, * * *." (*Ibid*, p. 9)

[29] 49 Stat. 620, 647. The identical language contained in § 1101(c)(6) was carried over to §§ 1426(d) and 1607(i) of the Internal Revenue Code of 1939.

[30] S. Rept. No. 1255, See Appendix B, p. 1755, *infra*.

[31] 1 Fed. Reg. Part 1, p. 1764 (1936), promulgated on November 9, 1936. The Social Security Board promulgated its regulations on

Considering this regulation years later, Judge Learned Hand said in *Radio City Music Hall, Inc.* v. *United States*, 135 F.2d 715 (CA-2) at pp. 717-718:

> "We accept Article 3 of Regulations 91 as an authoritative definition of the distinction between an 'employee' and an 'independent contractor'—it is really no more than a gloss upon the definition contained in Justice Gray's opinion in Singer Manufacturing Co. v. Rahn (132 U.S. 518, 523) * * *. The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said, though the regulation redundantly elaborates it." [32]

Constricted coverage under the Social Security Act was initially evidenced by the exemption of a number of specific categories of conceded employers and employees. Additionally, in the covered categories, individuals in borderline occupations were included or excluded from benefits coverage depending upon how the common law rules were applied to their separate contractual arrangements.

> (ii) ***1939-1947: Benefits allowance coverage was extended to additional occupational groups but the definition of "employee" remained unchanged, despite attempts to broaden it. Maritime personnel were included in social security coverage on the same basis as other occupations.***

In 1939 amendments to the Act extended coverage to a greater number of occupational groups. Among others, maritime personnel were removed from the exempt cate-

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July 21, 1937 which were identical in all material respects. 1 Fed. Reg. Part 1, p. 1276 (1937). It is reproduced in *United States* v. *Silk*, 331 U.S. 704, 714, ftn. 8.

[32] Congress approved Judge Hand's interpretation of the definition of "employee" and specifically adopted the Treasury Regulation as its common law definition of employee. Sen. Rept. No. 1255, Appendix B, pp. 1755-1756, 1761, *infra*.

gories and covered under the Act.[33] The definition of "employee", however, was continued without change.[34]

Despite petitioner's contentions to the contrary,[35] Congress' intention was clear that the maritime's coverage into the system was to be unaccompanied by special rules. The applicable sections made no distinction between an employee for purposes of a tax case involving maritime personnel and any other type of employee. The Committee Report stated:

> "No substantive change in existing law is made * * * except the extension of the definition to include service on American vessels. * * * Service performed on * * * an American vessel * * * will be on the same basis as regards inclusion as other services performed within the United States." (S. Rept. No. 734, 76th Cong., 1st Sess., pp. 55, 73-74.)

The intention of the Congress that "employee" in the Social Security Act should have its usual meaning under common law rules realistically construed were reaffirmed when the Congress otherwise made fundamental changes in the 1939 Act. Congress "rejected the Social Security Board proposal to enlarge it so as to encroach into the

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[33] 53 Stat. 1360, c. 666, amended the Social Security Act, § 209(b) to read in pertinent part: "The term 'employment' means any service * * * of whatever nature performed after December 31, 1939 by an employee for the person employing him, irrespective of the citizenship or residence of either, (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States * * *, except—."

[34] 53 Stat. 1360, 1386; 26 USC 1426(d) of the 1939 Code.

[35] Petitioner's Brief p. 20-21: "Nothing in the legislative history fairly ascribes to Congress the anomalous intent of having maritime activities subject to standards, for Social Security purposes, other than those which are relevant to enterprises conducted at sea. Rather, we should suppose Congress intended the employer-employee relationship to be evlauated according to the standards that have been traditionally applied in the context of a particular industry."

field of independent contractors and the self-employed." [36] The proposal was to broaden the definition of employee to cover more persons who furnished primarily personal services, but whose legal status was probably not that of an employee.[37] The Finance Committee, debating whether the term "employee" should have its meaning according to the principles of the common law or should be given a special statutory definition, concluded: "It is believed inexpedient to change the existing law which limits coverage to employees." Sen. Rept. 734, 76th Cong. 1st Sess. p. 75. After conference, the Senate position was upheld.[38] Enacting the bill with no change, Congress adopted the rules for distinguishing employee and independent contractor set out in the existing Treasury Regulations.[39]

There was no difficulty in making clear-cut determinations for social security coverage respecting masters and seamen of the merchant marine with their uniform hiring practices, fixed wages and prescribed routes and schedules. But coverage for fishermen was viewed differently. In the course of the debates the Senate proposed an amendment to exempt all fishermen from coverage.[40] Finally, following a congressional compromise, the amended Act as passed specifically exempted fishermen engaged in commercially fishing for salmon and halibut

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[36] S. Rept. No. 1255, see Appendix B, p. 1756, *infra*. See also S. Rept. No. 734, 76th Cong. 1st Sess. p. 75.

[37] Hearings, Committee on Ways and Means, 76th Cong. 1st Sess. p. 8; see, also, H. Rept. 728, 76th Cong. 1st Sess. p. 18.

[38] H. Rept. [Conf.] No. 1461, 76th Cong. 1st Sess., p. 14.

[39] Sen. Rep. No. 1255, see Appendix B, p. 1757, and fn. 2, *infra*.

[40] "Amendment No. 40. This amendment would exclude fishermen from coverage. It would also exclude officers and members of crews of any vessel less than 400 tons, or any sail vessel regardless of tonnage if the vessel is engaged in specified fishing activities. There was no comparable provision in the House bill." H. Rept. [conf.] No. 1461, 76th Cong. 1st Sess. p. 9.

and those serving on vessels under 10 net tons.[41] All others in commercial fishing were covered by the Act. But among fishermen in the covered class, a considerable number would, nevertheless, have been excluded from coverage under the 1939 Code, prior to January 1, 1951[42] if it was determined they were not employees by application of the common law rules.

The federal courts, however, applied varying standards in determining who were employees in various occupations: A majority held that the term was to be given its common law meaning;[43] a few ignored the common law test and looked instead to the purposes of the legislation for guidance;[44] and still others looked to both the purposes of the legislation and the common law rules for guidance.[45]

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[41] H. Rept. No. 1461, 76th Cong., 1st Sess. p. 14 (Amendment No. 93). 53 Stat. 1360, 1373 (42 USC Supp. IV §§ 410, 410a) § 209(b) defines "employment" listing exceptions. Pertinent here is subsection (14) of the exceptions which for our purposes reads: "service performed by an individual in (or as an officer or member of the crew of the vessel while engaged in) the catching * * * of any kind of fish * * *, except (A) service performed in connection with the catching or taking of salmon or halibut for commercial purposes and (b) service performed on * * * a vessel of more than 10 net tons * * *."

[42] The effective date of the 1950 amendments to the Social Security Act, extending coverage to the self-employed. 64 Stat. 477, c. 809. See, 26 USCA §§ 480-482, (1939 Code), renumbered § 1401, et seq., 1954 Code. See, Appendix "A", p. 8A-11A, *infra*.

[43] See, e.g. *Texas Co.* v. *Higgins*, 118 F.2d 636 (CA-2); *Radio City Music Hall Corp.* v. *United States*, 135 F.2d 715 (CA-2); *Jones* v. *Goodson*, 121 F.2d 176 (CA-10); *Glenn* v. *Beard*, 141 F.2d 376 (CA-6); cert. den. 323 U.S. 724; *United States* v. *Mutual Trucking Co.*, 141 F.2d 655 (CA-6); *McGowan* v. *Lazeroff*, 148 F.2d 512 (CA-2); *United States* v. *Wholesale Oil Co.*, 154 F.2d 745 (CA-10).

[44] See, e.g. *United States* v. *Vogue*, 145 F.2d 609 (CA-4), where the Court followed the principle enunciated in *NLRB* v. *Hearst Publications*, 322 U.S. 111, that the term "employee" was to be construed not by reference to "technical common-law concepts," but rather by reference to the purpose of the Act and the facts involved in the economic relation. (*Ibid*, at p. 129)

[45] *United States* v. *Aberdeen Aerie*, 148 F.2d 655 (CA-9); *Grace* v. *Magruder*, 148 F.2d 679 (CA DC), cert. den. 326 U.S. 720.

(iii) *1947-1949: The aftermath of this Court's decisions in* United States v. Silk *and* Harrison v. Greyvan Lines *(331 U.S. 704) and* Bartels v. Birmingham *(332 U.S. 126) caused Congress to amend the Code and define "employee" for the first time in unequivocal statutory language.*

Because of the varying standards applied by the lower courts, this Court in 1947 handed down two opinions in *United States* v. *Silk* and *Harrison* v. *Greyvan Lines*, 331 U.S. 704 and *Bartels* v. *Birmingham*, 332 U.S. 126.

In *Silk*, the status of two groups—coal loaders and truck drivers—was in question, while in *Greyvan* the dispute involved the status of moving van drivers. By the application of the common law test stated in the Treasury Regulations, the lower courts concluded all three groups were independent contractors.[46]

This Court upheld the Treasury's determination that the coal loaders were employees, but affirmed the lower court's judgments for the taxpayers that the truck and van drivers were independent contractors. As to the coal unloaders, this Court noted that they provided only picks and shovels, engaged in work of a menial nature for Silk who "was in a position to exercise all necessary supervision over their simple tasks. Unloaders have often been held employees in tort cases." (331 U.S. at 718)

In reaching these decisions, the Court noted in *Silk* that: "No definition of employer or employee applicable to these cases occurs in the Act. * * * Nothing that is helpful in determining the scope of the coverage of the tax sections of the Social Security Act has come to our attention in the legislative history of the passage of the Act or the amendments thereto." (331 U.S. at p. 711).[47]

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[46] *United States* v. *Silk*, 155 F.2d 356, 359 (CA-10) and *Greyvan Lines, Inc.* v. *Harrison*, 156 F.2d 412, 415-416 (CA-7)

[47] The case seemed to turn on the definition of "employment" (331 U.S. p. 712, ftn. 6), although reference was made to the dis-

Finding no basis for construction in the words of the Act itself, the Court resorted to generalities, giving emphasis to the social purposes of the legislation.

The opinion stated that while control should be a factor in the determination of the employment relationship, it was not the sole criterion. Language followed expanding the definition of "employee" beyond anything which had ever been included before, stating that the term must be understood with reference to the facts involved in the economic relationship between the employer and the hired party.[48]

A week later in *Bartels* v. *Birmingham*, 332 U.S. 126[49] this Court reiterated that the test of the relationship was not to be ascertained solely by the control factor, but in the light of economic dependence on the business to which the service is rendered.[50]

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tinction between employees and independent contractors in the existing Treasury Regulations emphasizing control. (331 U.S. p. 713, ftn. 8)

[48] "As federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. Such an interpretation would only make for a continuance, to a considerable degree, of the difficulties for which the remedy was devised and would invite adroit schemes by some employers and employees to avoid the immediate burdens at the expense of the benefits sought by the legislation." (331 U.S. at p. 712)

[49] Here this Court, reversing the Circuit Court, adopted the findings of the District Court which found that members of name bands were not employees of the taxpayer dance-hall operator. In reaching the result, the Court noted that the bandleader, rather than the taxpayer controlled the details of the enterprise. Not deemed decisive was the fact that under a standard form contract between the musicians' union and the dance-hall operators, the latter were specified to be the employers of the musicians and their leader and "shall at all times have complete control of (their) services. * * *" Such a contractual shift, it was held, did not authorize the Commissioner to collect taxes from those not covered by the taxing statute. (332 U.S. at 132)

[50] "* * * but in the application of social legislation, employees are those who as a matter of economic reality are dependent upon the business to which they render service." (332 U.S. at p. 130)

Prompted by language borrowed from the prefatory remarks in *Silk*[51] and the dictum in *Bartels*,[52] the executive agencies set about promulgating new regulations[53] to embody the test of "economic reality" in the light of the "total situation", instead of the narrower common law test of power to control the manner in which the work is done. See, *United States* v. *Thorson*, 282 F.2d 157, 159-161 (CA-1) and *Illinois Tri-Seal Products, Inc.* v. *United States*, 353 F.2d 216, 224-228 (Ct. Cl.). The agencies asserted that the new test was substantive and would determine the employer-employee relationship by replacing the common law test because "it is law pronounced by the Supreme Court", and "is compelled by the Supreme Court."[54]

Rejecting the agencies' proposed new regulation, the Finance Committee, without subtlety and with obvious pique at what it considered a flagrant usurpation of its legislative prerogatives by the administrative agencies, said that the argument that the Supreme Court in these cases "established new substantive law for determining an employer-employee relationship cannot be accepted. It is self-destructive, for Congress continues to have the exclusive power to make law." [S. Rept. No. 1255, Appendix B, p. 1766, *infra*.]

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[51] See excerpt from *Silk* opinion in footnote 48, *supra*.

[52] See excerpt from *Bartels* opinion in footnote 50, *supra*.

[53] 12 Fed. Reg. 7966 (1947). Part (b) of the proposed regulation stated in part: "Whether services performed by an individual constitute him an employee as a matter of economic reality * * * is determined in the light of a number of factors * * *." To the factors listed in the existing regulation, the proposed new regulation would have added— (1) degree of control, (2) permanency of relation, (3) integration of the individual's work in the business to which he renders service, (4) skill required, (5) investment in the facilities for work by the individual and (6) opportunities of the individual for profit or loss. In sum, it literally ignored control elements and gave weight instead to the individual's economic dependence on the business to which he renders service.

[54] Sen. Rept. No. 1255, see Appendix B, pp. 1765 and 1766, *infra*.

Congress' sharp reaction to this administrative undertaking led to the enactment in June 1948 of H. J. Res. 296 [55] over the President's veto.[56] That resolution (known as the 'Gearhart resolution' "to maintain the status quo in respect of certain employment taxes and social security benefits pending action by Congress on extended social security coverage") amended §§ 1426(d) and 1607(i) of the 1939 Code to provide that the term "employee"—[57]

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[55] 62 Stat. 438, c. 468 Pub. Law No. 642, Act of June 14, 1948, 80th Cong. 2nd Sess., resulting from H. J. Res. 296 and H. Rept. No. 1319 and S. Rept. No. 1255, 26 USC §§ 1426(d) and 1607(i) of the 1939 Code. The legislative history elaborately demonstrates Congress' rejection of the "dependency" or "economic reality" tests, at the same time reaffirming the common law rules contained in the existing Treasury regulations as applicable in determining employment relationships for social security purposes. See, Appendix B, pp. 1753-1755; 1760-1764; 1769 *infra*.

[56] See, *Illinois Tri-Seal Products, Inc.* v. *United States supra*, 353 F.2d p. 225, ftn. 12.

[57] When the resolution was before the House on the motion to pass it over the President's veto, Representative Gearhart, who was in charge, made the following statement concerning the Supreme Court decisions, the proposed Treasury regulation, and Congressional purpose underlying the resolution (94 Cong. Rec. 8189, June 14, 1948):

> However, there crept into these decisions a little of what lawyers call obiter dicta; that is, some words which were quite unnecessary to the result. These words were to the effect that, for purposes of social security, the Social Security Administration was not necessarily bound in extending the social-security coverage, by the ancient common-law definition of master and servant, or employer and employee, as you may choose to call it, but that they could take into the system as employees any persons who were dependent upon a business in the light of economic realities, thereby throwing into the entire system a confusion which required immediate legislative attention.
>
> The Social Security Administration and the Treasury proceeded immediately to prepare a departmental regulation to carry that obiter dicta definition into effect. If this Congress had not interfered, tens of thousands of people in America who never dreamed they were employed by anybody and never for one moment thought they were covered by social security or subject to payroll taxes would have found that they had been swept into the social security system by bureaucratic ukase. In other words, they would suddenly have found that they had more em-

does not include (1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

By the exclusionary language thus employed, Congress excluded from coverage not only those who had the status of an independent contractor, but without naming them, others not employees under the common law rules. This observation is relevant because the problem is considered as though there is a single alternative, that is, that the person in question must be treated either as a conventional employee or an independent contractor in the common acceptance of that term. But such reasoning ignores the language of the 1948 Gearhart amendment which "recognized that under the common law there are those other than independent contractors who are not employees." [58]

The legislative history and the wording of the provisions of the "Gearhart amendment" clearly demonstrate that the congressional intent underlying its passage was to override any notions of the application by the courts or agencies of the "economic reality" or "dependency" tests proposed. Instead, the employment relationship was to be decided "by an application of the rules of the common law with specific reference to the common law dis-

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ployers than a dog had fleas. So, to end this confusion, this Congress acted promptly, and, after thoroughgoing debate, and by a vote of nearly 7 to 1, proceeded by legislation to put the matter in order once again by restoring the ancient doctrine of the common law defining the relation of master and servant, employer and employee.

See also *United States* v. *Thorson*, 282 F.2d 157, 161 (CA-1); *Party Cab Co.* v. *United States*, 172 F.2d 87, 90-1 (CA-7), cert. den. 338 U.S. 818.

[58] See, *Party Cab Co.* v. *United States*, 172 F.2d 87, 90 and 93 (CA-7), holding taxicab drivers were not employees. Cert. den. 338 U.S. 818. Acquiesced in by the Commissioner of Internal Revenue, 1951-2 C.B. 162-168.

tinction, hard as it sometimes is to draw, between an employee and an independent contractor." [59] The legislative expression contained in Appendix B, *infra*, pp. 1752 *et seq.* not only substantiates "but clearly and definitely emphasizes that Congress intended the words it used to mean exactly what they say." [60]

The Finance Committee Report on the resolution [61] commented that the usual common law rules were well stated in the existing regulations (as contrasted with the proposed regulation) and that the existing regulation might be considered a valid extension of congressional intent; that the "economic reality" concept was basic to the proposed regulation and the proposed regulation would, therefore, discard the common law rules for a new rule of "nebulous" and "dimensionless" character; that the proposed regulation would bring within the coverage of the Act many persons whose activities were largely or wholly free from direction as to how, and in frequent cases, as to when or whether they pursued them; and that when such services were performed without any direction or right of direction over the persons who performed them, and the persons who performed them were not in the least accountable for what they did, "then properly under existing Treasury Regulations such persons were recognized as independent contractors or self-employed in a class with independent contractors." [62]

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[59] *United States* v. *Thorson*, 282 F.2d 157, 158 (CA-1); *Dimmitt, et al* v. *Finnegan*, 179 F.2d 882, (CA-8), cert. den. 340 U.S. 823.

[60] *United States* v. *Thorson, supra*, 282 F.2d at 158.

[61] The legislative history of the resolution was considered in *Illinois Tri-Seal Products, Inc.* v. *United States*, 353 F.2d 216 (Ct.Cl.); *United States* v. *Crawford Packing Co.*, 330 F.2d 194, (CA-5); *United States* v. *Thorson*, 282 F.2d 157, 159 (CA-1); *Dimmit, etc.* v. *Finnegan*, 179 F.2d 882, 888 (CA-8), cert. den. 340 U.S. 823; *Party Cab Co.* v. *United States*, 172 F.2d 87, 89-91 (CA-7); *Crossett Lumber Co.* v. *United States*, 79 F.Supp. 20, 23-25 (WD Ark.).

[62] Sen. Rept. No. 1255, see Appendix B, pp. 1761, 1762-1764, *infra*, and also Appendix "C" p. 1C *infra*.

The legislative history further indicates that Congress accepted the decisions of the Court in *Silk* and *Bartels* insofar as "the moving principles by which the Supreme Court reached those decisions were the usual common law tests and principles realistically applied." [63] Rejecting the random remarks which gave rise to a different interpretation, the Finance Committee Report stated:

> "Those who challenge this, and oppose with conflicting interpretations, have the unhappy burden of demonstrating that the Supreme Court has the right to make its own law in the field." [64]

Totally rejecting the agencies' proposed regulation, but adopting the results in *Silk* and *Bartels*, the Committee Report concluded:

> "A sound reading of these cases (Silk and Bartels) requires that the prefatory and random remarks of the Court which have been seized upon to supply a spurious gloss of validity to the proposed Treasury regulation shall be harmoniously related to the facts involved, the decisions, and to their moving rules; and if this cannot be done they must be regarded as surplusage.
>
> "If we were compelled to interpret these remarks of the Court we would say, in untechnical and summary fashion and without arriving at complete exposition, that the lower courts and administrative agencies were told: Don't be fooled or unduly influenced by the form of the arrangement to which you must apply the Social Security Act. Look to the real substance. Illuminate the usual common law tests by regard for all the pertinent facts. This requires that all of the realities that will lead you to the truth must be consulted and weighed along with all other significant indicators of the real substance of the arrangement.

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[63] Sen. Rept. No. 1255, see Appendix B, p. 1766, *infra*.

[64] *Ibid*, p. 1769.

> "But this again should be said: If we have misinterpreted these decisions of the Supreme Court, if we have incorrectly called the real moving principles of these cases, if the Treasury's interpretations of the proposed regulation based upon them are correct, then by this resolution we propose to restore the usual common law rules, realistically applied." [65]

Congress' efforts were thus directed toward the establishment of a federal standard, irrespective of the "common law" of the states, for the guidance of the federal courts in determining coverage and fixing tax liabilities under §§ 3121(d) and 3306(i), Internal Revenue Code.[66]

House Report No. 2168, 80th Congress 2nd. Sess., titled "Social Security Amendments, 1948", disclosed unmistakably the congressional insistence that the common law control test apply when defining "employee" in these cases. The pertinent portion is set out at p. 9: [67]

> "Your Committee feels that although no clear statutory line of demarcation can ever be drawn which will do away with this twilight occupational zone, the Social Security Act can and should be amended nonetheless so as to keep such determinations within the reasonable limits intended by the Congress. Our

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[65] S. Rept. No. 1255, see Appendix B, p. 1769, *infra*.

[66] The Committee Report (Appendix B, p. 1757) noted that prior to *Silk*, *Greyvan* and *Bartels*, some federal courts adopted the precedents of local law in determining the existence of an employer-employee relationship and that since these varied among the states, conflicts in decisions followed though factual determinations were not unlike. The Report added, (Appendix B, p. 1758) that properly interpreted, the Supreme Court decisions "should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act." See *United States* v. *Crawford Packing Co.* 330 F.2d 194, 195, fn. 5; and *Crossett Lumber Co.* v. *United States*, 79 F.Supp. 20, 25 (WD Ark., 1948).

[67] House Report No. 2168, dated June 2, 1948, was published twelve days before the enactment of the "Gearhart amendment" on June 14, 1948. This Report was reprinted in the Hearings of the Ways and Means Committee, 81st Cong. 1st Sess. Part 2 (H.R. 2893, Social Security Amendments of 1949) pp. 1104-1105.

failure to act may be further construed as conferring upon the administrative agencies and the courts an unbridled license to say at will whether an individual is an employee or an independent contractor. For this reason your Committee has provided in this bill that a statutory definition of the term 'employment' will be incorporated in the social security act which points unmistakeably to the common law concept of master and servant and in which the sole determining factor is the degree of direction and control retained by the employer over the work to be done and over the method of doing it. Ample flexibility is possible under such a rule to accommodate peculiar or unusual employment relationships so frequently found in our complex economic system.

"There are a number of evidentiary facts which may be shown in any given case to establish or disprove the paramount fact of control. They include such facts as the nature of the individual's compensation (whether it be profits or wages), the regularity of the service rendered, the degree of supervision involved, the extent to which tools, equipment and facilities for performing the work are supplied by the person for whom such services are rendered, the fixing of hours of work, the right of discharge, the extent to which reports and accounts are required, and so forth. There is no need, in the opinion of your Committee, to go beyond such tests in determining the ultimate employment status of a person who renders service for another. They are clear, easily proven to exist, or not to exist, and susceptible of realistic application.

"In considering these questions, the basic controlling factor is whether the policy of the Congress shall be to cover as employees only those who are employees under the common law rule, or to cover a broader class of individuals under some nebulous hypothesis with no bounds to its application. If the common law rule is to be followed and your Committee believes it should be followed, it would seem

much more satisfactory to refer to it specifically in the statute, rather than attempt to spell it out in statutory language. Spelling it out would undoubtedly produce endless litigation over the meaning of each word in the spelled-out rule.

"The common-law concept of master and servant, of course, is no more fixed and immutable than the common law itself. Hence it will produce in practice varying results under varying circumstances and in different jurisdictions. But such variations will not offend the common law rule itself. They will not nullify or afford the basis for nullifying the right of the Congress to determine the limitations of coverage under the Social Security Act."

(iv) ***1950-1953: The 1950 amendments extended coverage to include the self-employed, alleviating the problem for inventing a colorable legal theory or a practical reason to create artificial employer-employee relationships on the basis of need.***

In 1949, the Administration urged the House Committee to repeal the "Gearhart amendment" and substitute the "economic reality" test for determining who were employees. Failing that, the alternative was to include under the Federal Insurance Contributions Act (FICA) several selected occupational groups whose status was not that of "employee" under the common law rules.[68] The Senate version of the bill eliminated those proposals.[69]

A congressional compromise resulted in extending coverage to specific categories of conceded non-employees who were deliberately brought within the coverage of the Act as "statutory employees" [70] but the common law control

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[68] Hearings, House Ways and Means Committee (H.R. 2893), 81st Congress 1st Sess., Part 2, pp. 1087-1088.

[69] S. Rept. No. 1669, 81st Cong., 2d Sess., pp. 95-97.

[70] § 3121(d)(3)(A)(B)(C) and (D), Internal Revenue Code Appendix A, p. 2A. These included persons in a variety of occupations (none of which are relevant here), such as agents or commission

test in the Gearhart amendment of 1948 "remain[s] undisturbed." [71] This compromise was part of the 1950 amendments to the Social Security Act, the main provisions of which extended coverage under the Old Age, Survivors and Disability Insurance (OASDI) program for the first time to the self-employed under SECA to the same extent as common law employees under FICA.[72]

Following the 1950 Amendments to the Act, the Commissioner of Internal Revenue issued a series of Employment Tax Rulings respecting the status of the "statutory employees" listed in § 1426(d)(3)(A)(B)(C) and (D), Internal Revenue Code, 1939 [renumbered § 3121(d)(3)(A)(B)(C)(D) of the 1954 Code], distinguishing them from common law employees, on the one hand, and the self-employed on the other.[73] The Commissioner considered that if an individual was not an employee for FICA

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drivers distributing specified products, full time insurance salesmen, certain home workers and traveling salesmen. See, H. Rept. No. 1300, 81st Cong. 1st Sess. pp. 81-91. Fishermen were not included. The Treasury's efforts to include fishermen as statutory employees later, in 1967, was unsuccessful. See, discussion, *infra*, pp. 45-46.

[71] 64 Stat. 477, 536, c. 809. § 1426(d)(2) of the 1939 Code was slightly changed without effect defining "employee" as "any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee." (Renumbered, § 3121(d)(2) of the 1954 Code, Appendix A, pp. 1A-2A) See, also, H. Rept. No. 1300, 81st Cong. 1st Sess. p. 80.

[72] 64 Stat. 477, 502, 540, c. 809. See, H. Rept. No. 1300, 81st Cong. 1st Sess., pp. 9-10. The 1950 amendment under discussion amended Chapter 1 of the Internal Revenue Code of 1939 by adding subchapter E, entitled "Tax on Self-Employment Income." It was referred to as the "Self-Employment Contributions Act" (SECA). It comprised §§ 480-482 of the 1939 Code. H. Rept. No. 1300, *supra*, at pp. 135-136, 140-141; S. Rept. No. 1669, 81st Cong. 2d Sess., pp. 153-154, 162.

[73] Employment Tax Rulings:

1951-1 CB 95 (full time life insurance salesmen);
1951-1 CB 97 (traveling or city salesmen);
1951-1 CB 99 (home workers)
1951-1 CB 103 (agent and commission drivers)

under the usual common law rules,[74] nor a statutory employee under FICA by virtue of the foregoing specified tests,[75] then clearly he was a self-employed person entitled to coverage under the Self-Employment Compensation Act (SECA).[76] By the agency's standards the fishermen here fall into this category. See Appendix "C", p. 1C, Social Security Handbook, § 1101, *infra*.

It becomes clear that petitioner's purpose in seeking this review was not to correct purported inequities resulting in purported denials of social security benefits to the fishermen (Petition pp. 15-16) nor to bolster "the manifest Congressional intent to apply these statutes to fishermen", (Pet. Br. p. 9) but solely to shift tax incidence from one group under the SECA (the fishermen) to another group under the FICA (the respondents and fishemen combined) for no apparent reason other than to serve the administrative convenience of the tax collector.

The Treasury Department was unsuccessful in its attempt to have fishermen legislated into the "statutory employee" category under § 3121(d)(3) Internal Revenue Code. (See discussion *infra*, pp. 45-46). Judicial

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[74] § 1426(d)(2), Internal Revenue Code of 1939, now § 3121(d)(2), 1954 Code.

[75] § 1426(d)(3)(A)(B)(C) and (D), Internal Revenue Code of 1939; now § 3121(d)(3)(A)(B)(C)(D), Internal Revenue Code of 1954.

[76] The Self-Employment Contributions Act, §§ 480-482 of the 1939 Code, is now cited as §§ 1401 et seq. of the 1954 Code. Under § 1402(c) of the Code and the Regulations, 26 CFR § 1.1402(c)-1, "Trade or Business" is defined. Appendix p. 11A *infra*. "Thus it may be stated generally that if (the person) is not an employee for purposes of the Federal Insurance Contributions Act, as amended, the provisions of Subchapter E, Chapter 1 of the Code (Tax on Self-Employment Income) will be made applicable. Determinations whether tax liability is incurred under subchapter E, chapter 1, of the Code should be made with due regard for the applicable income tax provisions of the Code since an individual's status as a self-employed individual is initially dependent upon whether he is engaged in a trade or business." See, Rulings in ftn. 73 *supra*; and Appendix "C" p. 1C, *infra*.

aid is sought here to construe the self-employed fishermen as colorable "employees" under the "usual common law rules" in an effort to circumvent Congress.

(v) ***1954—Fishermen on vessels under 10 net tons were included under FICA and SECA, but excluded under FUTA.***

In 1954 the Social Security Act amendments pertinent here removed the exemption of salmon and halibut fishermen and fishermen on vessels under ten net tons from operation of the FICA under § 1426(b) of the 1939 Code.[17] The exemption continued under FUTA, § 1607 (c).[18] The effect was to include these fishermen with other individuals in the social security system. Their benefits and tax liabilities, like others, were determined by whether they were common law employees or self-employed persons under the statutory test. As to both, FICA and SECA, coverage for benefits was equal, only their tax liabilities were different. See, Pet. Br. p. 21.

(vi) ***1967: Congress rejected the Treasury's recommendation to amend the definition of "employee" to include fishermen under FICA.***

In 1967, shortly after the decision below was rendered in the District Court, the Treasury Department sought to amend §§ 3121(d)(3) defining "employee" to include fishermen whose commercial fishing activities were similar to those embraced in the Court's findings. (R. 315-334) The Senate Finance Report observed that the proposed amendment—

> "* * * identified captains and crew members of fishing vessels as employees for purposes of Title II of the Social Security Act * * * irrespective of the

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[17] 68 Stat. 1052, 1054, c. 1206; 26 USC §§ 1426(b) and 1607(c); under the 1954 Code, the sections were renumbered § 3121(b) and 3306(c).

[18] *Ibid.*

common law status of these persons. The amendment thus makes it unnecessary to determine the status of these persons under the common law rules applicable to an employer-employee relationship." [79]

The opinion below observed that the proposed amendment did not pass.[80] Further, it was interesting to note that since 1950 various amendments to the Internal Revenue Code were proposed, but no attempt was made to alter the definition of "employee" in Sections 3121(d) and 3306(i),[81] nor was the status of fishermen mentioned except as noted above. Congress' reluctance to amend the definition of "employee" and the rejection of the Treasury's proposal here, indicated its intention to retain the common-law test in the statutes and regulations as the sole test for determining employer-employee relationships, whether they be maritime personnel or individuals in other occupations.

II

a. That the Captains and Crewmen were Employees of the Respondent Owners in contemplating the formers' Rights under Maritime Law is irrelevant when deciding the Respondents' Employment Tax Liability determined by the Definition of "Employee" under Sections of the Internal Revenue Code.

The Internal Revenue Code and general maritime law, separated by centuries in time and providing different rights and remedies, are both important and neither is diminished nor enhanced in significance by the other when applied to the activities of the same individual.

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[79] Social Security Amendments of 1967, H.R. 12080, as amended by the Senate, Section 504(b)(1)(2), and Sen. Rept. No. 744, 90th Cong. 1st Sess. p. 320. Also, see opinion below (R. 363, fn. 5).

[80] [Conf. Rept.] H. Rept. No. 1030, 90th Cong. 1st Sess. p. 74, and (R. 363, ftn. 6).

[81] *Barrett* v. *Phinney*, 278 F. Supp. 65, 71 and ftn. 5 (Tex.).

Petitioner, under Point I (Pet. Br. pp. 17-25) argues that respondents' obligations to the fishermen for maintenance and cure are decisive of an employer-employee relationship under principles of maritime law. Petitioner correctly stated a principle of maritime law, but nothing more. By petitioner's analysis, the legal relation of master and servant for fixing respondents' employment tax liabilities would, without restriction, extend to the entire area of one rendering service to another by the simple device of evaluating the relationship, in some unexplained way, "according to the standards traditionally applied in the context of a particular industry." (Pet. Br. pp. 20-21).

Apparently petitioner reasons that if a fisherman is entitled to maintenance and cure, then, *a fortiori*, he is a "seaman". If he is a seaman, he is in the service of the ship and hence an "employee" of the boat owner under maritime law. But petitioner evades the issue and argues in non-sequiturs. Under general maritime law whether one is a "seaman" lies in the answer to these questions: "(a) Is the vessel in navigation? (b) Is there more or less a permanent connection with the vessel, as distinguished from a visitor or passenger? and, (c) Are the services rendered maritime in character?" Norris, *The Law of Seamen* (1962 ed.) p. 6.

The foregoing criteria, defining the term "employee" for adjusting rights and invoking remedies by interested parties in maritime jurisdiction, hardly import the traditional determinants that all agreed were essential for deciding respondents' tax liabilities here. (See Pet. Br. p. 17) The answers to the foregoing questions, defining a maritime "employee", ignore the control factor germane to the applicable common law control test. Decisive for maintenance and cure is the individual's status as a seaman and his attachment to the vessel. For a thousand years the law itself has imposed the seaman's right irrespective of his contractual arrangements with the ship-

owner. "Whether by traditional standards he (boat owner) is or is not responsible for the injury * * *, he is liable * * * as an incident of the marine employer-employee relationship." *Aguilar* v. *Standard Oil Co.*, 381 U.S. 724, 730. A term in the contract by which a seaman purported to waive his right to maintenance and cure would be unquestionably void. Gilmore and Black, *The Law of Admiralty*, 1957 ed. p. 257; *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367, 371.

This right is often analogized to workmen's compensation statutes,[82] state and federal. 1 *Benedict on Admiralty*, p. 55, 62. Employment relationships under workmen's compensation, to give vitality to the remedial purposes pertinent to that area of the law, import the "nature of the work test" [83] whose criteria are the antithesis of the common law rules applied in tax cases. It has often been said that, "the basic purpose for which the definition (employee) is used in compensation law is entirely different from the common law purpose." Larson, *Workmen's Compensation*, § 43.42, 1967 ed.

Petitioner would fare no better by focusing attention to a seaman's rights to recover for negligent injuries under the Jones Act.[84] The remedial purposes of that

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[82] "The remedy (maritime) is an adequate and effective system of workmen's compensation, adequate in amount and prompt in administration." *McAllister* v. *United States*, 348 U.S. 19, 24 (separate opinion).

[83] This test consists of the analysis of the following: (1) character of the work; (2) the extent to which the worker is engaged in a separate calling; (3) how continuous or intermittent the work is; (4) whether the work is temporary or permanent; (5) importance of the work to the employer's business; and (6) the character of the relation to determine whether or not the particular employment can carry its own accident burden. The existence of the employment relationship is based on these factors without regard to whether or not the principal has the right to control the manner and method of the work being done. *Rayhill* v. *United States*, 364 F.2d 347, 355 and fn. 5 (Ct.Cl.)

[84] Merchant Marine Act of 1920, c. 250, 41 Stat. 988, Sec. 33, 46 USC § 688.

legislation require a liberal construction of "employee", undefined in the Act, favoring employment relationships to give protection where it is needed. See, *Jamison* v. *Encarnation*, 281 U.S. 635, 640. This Court has repeatedly said that the Jones Act is "an avowed departure from the rules of the common law." *Hopson* v. *Texaco, Inc.*, 383 U.S. 262, 264.

But none of these considerations have a remote bearing on the resolution of respondents' tax liabilities. The maritime cases cited at Pet. Br. pp. 18 and 22-23 discuss employment relationships and the rights and remedies flowing from them under maritime jurisdiction. The parties there were seamen, owners and others concerned in the resolution of issues involving their contracts or maritime torts. But here, the only parties are the respondent-boatowners and the United States government. The sole issue here is whether or not the boatowners owe taxes to the government. The fishermen are not parties to this suit and "have no direct interest in this controversy, nor does it appear their rights are directly affected. * * * The [fishermen's] status for other purposes is not at issue, nor would it seem they would be bound by any attempt to decide such status in a proceeding in which they are not parties." See, *Thor Co., et al* v. *United States*, 173 F. Supp. 65, 69 (Mass.) aff'd. *sub. nom., United States* v. *Thorson*, 282 F.2d 157 (CA-1). "The sole issue here is whether these [fishermen] were employees within the meaning of the pertinent federal tax statutes. This question cannot be determined by whether or not they were employees within the meaning of a * * * workmen's compensation law or [maritime law]." *Rayhill* v. *United States, supra*, 364 F.2d at 356.

Obviously, the term "employees" for purposes of recovery in maritime actions encompasses not only common law employees, but others not common law employees, who nevertheless meet the "nature of the work test" or "eco-

nomic reality" test [85] important to interpretations which give effect to remedial legislation. In this connection, because of the difference in concept between an "employee" for maritime purposes and an "employee" for federal tax purposes, an employee's (seaman's) right to maintenance and cure or Jones Act damages cannot be considered an indication that he mechanically becomes a common law employee for tax purposes. It is generally understood that an individual may be an "independent contractor" under the common law control test for "imposing vicarious liability in tort, and may be an 'employee' for the purpose of particular legislation, such as unemployment compensation." *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 122. It would be no different under maritime law.

The respondents' actions here may have a maritime flavor revolving about sea-going vessels but no maritime issues are involved. Their suits are simply for the recovery of taxes erroneously paid. The provisions of the Internal Revenue Code apply, not principles of admiralty.

An axiom of statutory construction announced by this Court in *Manhatten General Equipment Co.* v. *CIR*, 297 U.S. 129, respecting tax liabilities is pertinent here. At 297 U.S. p. 135:

> "The [tax] statute defines the rights of the taxpayer and fixes a standard by which rights are measured."

The importance of understanding a tax statute was clearly stated in Griswold, *Cases and Materials on Federal Taxation* (6th ed. 1966) p. 14:

> "The *first* matter to consider in *any* tax case is: What are the words of the statute? There is no use thinking great thoughts about a tax problem unless the thoughts are firmly based on a controlling stat-

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[85] Discussed, *supra*, pp. 35-40 and Appendix B, pp. 1762-1763 *infra*.

> ute. A certain amount of common law of federal taxation has developed, but federal taxation is not a common law subject."

Having these fundamental principles of tax law and maritime law clearly in mind, the Circuit Court below observed that "If we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision." (R. 362). But noting that "The words of the statute here are clear and explicit", the Court properly determined "the relationship is to be made on the basis of the common-law tests." (R. 362)

Nothing in the tax statutes' background, history, terms or purposes indicates that the term "employee", for tax purposes, is to be evaluated according to the standards applied by the admiralty courts when resolving maintenance and cure or other issues peculiar to the maritime industry. (See Pet. Br. pp. 20-21) Nor are the sections to be administered by the Treasury Department in accordance with whatever different standards that agency may see fit to adopt for the disposition of unrelated problems. See, *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 124.

Nor is there a suggestion that either the admiralty courts or the Treasury Department should abandon independent inquiry into the requirements of their separate statutes or mechanically accept standards elaborated by each other under different statutes for wholly different purposes. See, *Local 1976 U. B. C. & J.* v. *NLRB*, 357 U.S. 93, 111. Here, petitioner urges the Court to act more like a committee of Congress than a court. It asks for a strained construction of simple language long accepted and used. Not one word of legislative history supports the petitioner's views.

The affirmance of the decision below changes nothing except to require the fishermen to pay their own social security taxes under SECA (about ¾ of the total of the combined tax under FICA). This will in no way frus-

trate the policy of the maritime law which uniformly insures the fishemen's rights to maintenance and cure and preserves their remedies under the Jones Act to recover for negligent injuries, irrespective of their status as independent contractors for other purposes.

b. The administrative Ruling (SST 387) was invalid as an Attempt at Enlargement of §§ 3121(d) and 3306(i), Internal Revenue Code, thus impinging upon the congressional Prerogative of Definition.

The petitioner's reliance on SST 387 (Pet. Br. pp. 22-23) as a basis for the decision here is misplaced. That it may serve as an agency guide-line for internal administration is immaterial. It cannot and has never operated "as a long standing administrative interpretation" (Pet. Br. p. 22) binding on taxpayers. Published in 1940, SST 387 purported to construe § 1426(d) of the 1939 Code at a time when there was no definition of the term "employee" in the Act, other than to say it "includes an officer of a corporation." 49 Stat. 620, 647. It purported to adopt principles governing maritime employment relationships, incident to recovery for maintenance and cure and for negligent injuries under the Jones Act, as the definition of "employee" for tax purposes. Congress drastically amended § 1426(d) in 1948 without mentioning SST 387 either in the voluminous debates or the elaborate Committee reports. (Appendix B, pp. 1752 et seq.) SST 387 has never been construed by a court either prior or subsequent to the Gearhart amendment of 1948 which unmistakably delineated the common law control test as the sole test for defining the term "employee" in these tax considerations. Nor has the petitioner called attention to dates of construction of the definition contained in SST 387. It clearly impinged upon the congressional prerogative of definition by legislative enactment. Section 7805 of the Internal Revenue Code confers power on the Secretary of the Treasury to make rules and regulations. And although administrative regulation is en-

titled to respect, authority to make rules and regulations is not the power to make law, for no such power can be delegated by the Congress. *Dixon* v. *United States*, 381 U.S. 68, 74; *Manhatten General Equipment Co.* v. *CIR*, 297 U.S. 129, 134. "A regulation which operates to create a rule out of harmony with the statute is a mere nullity." *Ibid*, 297 U.S. at 134, citing *Lynch* v. *Tilden Produce Co.*, 265 U.S. 315, 320-322.

The meaning of §§ 3121(d) and 3306(i) and the implementing Treasury Regulations adopted by Congress as definitive here are unambiguous. The terms of SST 387 were not only contradictory, but attempted to add a supplementary legislative provision which Congress declined to enact.[86] See, *Helvering* v. *Credit Alliance Co.*, 316 U.S. 107, 113.

Apart from the foregoing, SST 387, as a mere Employment Tax Ruling coming out of the legal staff of the taxing agency, had no more legal force than the opinion of any other lawyer. It had "none of the force or effect of Treasury Decisions and [does] not commit the Treasury Department to any interpretation of the law." See, the cautionary notice published on the first page of the bulletin containing SST 387. Laying aside the fact that departmental rulings not promulgated by the Secretary are of little aid in interpreting a tax statute, *Helvering* v. *New York Trust Co.*, 292 U.S. 455, 467-468, where the law is plain, the subsequent re-enactment or amendment of a statute does not constitute an adoption of its administrative construction. *Helvering* v. *Credit Alliance Corp.*, 316 U.S. 107, 113.

What the petitioner asks here is not a construction of a statute, but an enlargement of it by the Court, so that what was omitted may be included within its scope. "To supply omissions transcends the judicial function." *Iselin* v. *United States*, 270 U.S. 245, 250-251.

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[86] See discussion of Congress' refusal to accept the Treasury's recommendation to amend § 3121(d)(3) to include fishermen, in the opinion below (R. 363 and ftns. 5 and 6; see also, *supra*, pp. 45-46).

c. There was no Conflict between the moving Principles of the Fifth Circuit's Decision here and that of the Court of Claims reaching a contrary Result.

The petitioner bottoms its argument for reversal here (Pet. Br. pp. 16, 20) as it did in the petition for the writ (Petition, pp. 6-7, 8) on an assumed conflict of approach between the Fifth Circuit's decision below (R. 357) and the Court of Claims' decision in *Cape Shore Fish Co.* v. *United States*, 330 F.2d 961. Actually, the decisions, despite the contrary results reached, were in full accord. The varying results were due in no small measure to the difference in facts and the weight accorded them by the finder of fact. It is significant that *Cape Shore* undertook to distinguish a predecessor Fifth Circuit decision,[87] which the opinion below considered authoritative. *Cape Shore* said at 330 F.2d p. 973 and ftn. 18: "The facts in *Crawford Packing* differed in material respects from the facts here." Basically the moving principle germane to the decision in *Cape Shore* was the common law control test in the statutes and regulations (330 F.2d at 963-964) the same as it was in *Silk*, *Greyvan* and *Bartels*. (See Appendix B, pp. 1766, 1769 *infra*) But the discussions of maritime law in *Cape Shore*, like "economic reality" in *Silk* and *Bartels*,[88] were *dicta*. A number of "fisherman" employment tax cases, decided prior [89] and subsequent [90] to *Cape Shore* made no mention

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[87] *United States* v. *Crawford Packing Co.*, 330 F.2d 194 (CA-5).

[88] Appendix B, pp. 1765, 1769, *infra*, also ftn. 48 and 50, *supra*.

[89] *Emard* v. *Squire*, 58 F. Supp. 281 (Wash.); *O'Hara Vessels, Inc.* v. *Hassett*, 60 F. Supp. 672 (Mass.) (cited as authority in *Cape Shore*).

[90] *Kirkconnell* v. *United States*, 347 F.2d 260 (Ct. Cl.) *Crawford Packing Co.* v. *United States*, 228 F.Supp. 549 (Tex.), aff'd. 330 F.2d 194 (CA-5); *Capital Trawlers, Inc.* v. *United States*, 216 F.Supp. 440, aff'd. 324 F.2d 506 (CA-1); *Star Fish & Oyster Co.* v. *United States*, 223 F.Supp. 402 (Ala.); *Williams Packing and Navigation Co.* v. *Enochs*, 176 F.Supp. 168 (Miss.), aff'd. 291 F.2d 402 (CA-5), dismissed on jurisdictional grounds, 307 U.S. 1. On retrial resulted

of maritime law. The last two cases cited in footnote 90 specifically rejected it. The Court of Claims itself ignored *Cape Shore's* maritime-oriented discussion in a later case decided under the same statutes and Regulations. See, *Kirkconnell, et al* v. *United States*, 347 F.2d 260 (Ct. Cl.)

It is noteworthy that *Cape Shore* (1964) discussed at length the control principles embraced in the statutes and regulations without a suggestion of the existence of their significant legislative history. But in 1965 and 1966, the same Court of Claims, in two employment tax cases involving applicators,[91] set out a detailed analysis of the legislative history and announced basic principles of tax statute construction alien to those discussed in *Cape Shore*. Had the Court's understanding expressed in *Illinois Tri-Seal* and *Rayhill* been applied in *Cape Shore*, the result would have been the same by virtue of the tight control exercised over the fishermen by the taxpayer-boatowner, but the maritime concept of employee would have been absent. What we have, therefore in *Cape Shore* is *dictum* from a single case whose maritime rationale is ignored by all courts, including the Court of Claims.

d. "The terms 'Employment' and 'Employee' are to be construed, not in a restricted Sense, but so as to accomplish the Purposes of the Legislation involved." [92]

The petitioner and the respondents are in accord with the statement expressed in the above caption. But they disagree respecting the application of the principles in-

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in a jury verdict for the taxpayer. *Williams Packing Co.* v. *United States*, Civil No. 2631 (SD Miss.), filed Feb. 17, 1964; *Barrett* v. *Phinney*, 278 F.Supp. 65 (Tex.) and *Jackson* v. *Phinney*, 266 F. Supp. 635 (Tex.)

[91] *Illinois Tri-Seal Products, Inc.* v. *United States*, 353 F.2d 216 (Ct.Cl.) and *Rayhill* v. *United States* 364 F.2d 347 (Ct.Cl.)

[92] Quoted from Petitioner's Brief, p. 21, citing *Westover* v. *Stockholders Publishing Co.*, 237 F.2d 948, 951 (CA-9).

volved. Petitioner contends that "Those persons are 'employees' who, as a matter of economic reality, are dependent upon the business to which they render service."[93] This is clearly wrong. Since the "1948 Gearhart amendment" and the clear congressional purpose announced in the Committee reports, no court today is justified in espousing "economic reality" as a basis for defining who are "employees" to accomplish the purposes of the legislation involved here. We all know that the remedial aims of the Social Security Act are to provide old age insurance to individuals by a system of wage or earnings credits acquired during their productive years. Where once the Act's benefits were the exclusive preserve of the common law employee, now, they are extended to all (with a few statutory exemptions) including the self-employed or independent contractors. Had the self-employed been covered originally in 1935, or even in 1939 when it was seriously considered,[94] there would have been no colorable legal theory or practical reason for attempting to create the artificial employer-employee relationships, urged here, based on economic concepts. At any rate, the necessity for petitioner's strained and tortured construction of §§ 3121(d) and 3306(i) no longer exists and has not since December 30, 1950.

The approach of this Court in *Silk* was that "The balance in close cases should be cast in favor of coverage rather than against coverage in order to fulfill the Statute's broad and beneficient objects." [*Silk*, 331 U.S. at p. 721 (separate opinion)]. The Fifth Circuit's opinion

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[93] Contained in *Westover* v. *Stockholders Publishing Co.*, 237 F.2d at 951, cited, Pet. Br. p. 21.

[94] Hearings, Committee on Ways and Means, 76th Cong. 1st Sess. (Soc. Sec. Amends. 1939) Vol. 1, p. 8:

> "The Board has given considerable study to the possibility of including self-employed persons under the old age insurance system. However, the Board is not prepared at this time to amend what it considers a practicable method for extending coverage to such persons."

below is consistent with those objects. It extends coverage to the fishermen under the Act as self-employed persons. See Appendix "A", pp. 8A-11A, *infra.*

The fault, perhaps, lies with the Treasury Department and the Social Security agency whose only excuse, up to 1950, for not including the self-employed was that it was not administratively feasible to cover them. [Hearings, Ways and Means Committee (H.R. 2893) 81st Cong. 1st Sess., part 2, p. 2449.] But in 1949 the Commissioner of Internal Revenue told the Committee that the experience of the past removed the barriers that existed and coverage for the self-employed could be administered with an even hand along with employees. [*Hearings, ibid,* pp. 1346, 1350-1351, 1352.] The Commissioner recommended that the "Bureau be permitted some flexibility in the matter of the type of collection system to be used * * *" and foresaw no difficulties in the long range program. [Hearings, ibid, p. 1352.]

The foregoing is clearly inconsistent with the petitioner's complaint in the Petition for the Writ at p. 15, saying: "* * * the Fifth Circuit has made it impossible to administer the Social Security and Unemployment Compensation statutes in an even-handed manner in the context of the fishing industry." And, "Further, the Social Security Administration, in paying social security benefits, is faced with a most difficult situation." (Petition, pp. 15-16) And, "The course of the decision in the Fifth Circuit poses a similar administrative dilemma for the Internal Revenue Service." (Petition, p. 17) Curiously, these various "dilemmas" were abandoned as a basis for decision in Petitioner's Brief here on the merits.

The petitioner's novel arguments urging a judicial construction of the word "employee" to include these fishermen is simply asking the Court to do, what Congress refused to do, when it rejected the Treasury's recommendation to legislate them as "statutory employees" under

§ 3121(d)(3).[95] As we said, the government's efforts are not at all directed to accomplishing the aims and purposes of the statute, but rather to gain some tactical advantage or administrative convenience for the tax collector.

e. Congress' Admonition against taking a restricted View of the Employer-Employee Relationship in making Coverage Determinations under the Social Security Act, concerned Congress' desire to give Coverage to four Categories of non-Employees, by special Amendment, leaving unchanged the Common Law Test for determining who were Employees generally.

The language in the 1950 Conference Report (Pet. Br. p. 16), relied upon by the petitioner, was not intended to expand the common law definition of employee under § 3121(d)(2) Internal Revenue Code to include non-employees. It embodied a Congressional promise to extend the OASDI program to persons other than employees. This promise was fulfilled when Congress legislated "statutory employees" into the system by adding subsections (3)(A)(B)(C)(D) to § 3121(d).[96] The self-employed were also included by the enactment of the Self-Employment Contributions Act (SECA).[97] The two Courts below recognized these distinctions in reaching their conclusions by a "realistic" application of the common law criteria in the Regulation and those noted in *Enochs* v. *Williams Packing Co.*, supra, 370 U.S. at 3.[98]

Under the decision below, the fishermen are self-employed persons. Their benefits coverage is no different, nor are their earnings credits less effective than those of

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[95] See pp. 45-46 supra. and opinion below. R 359 and footnotes 2 and 3.

[96] See discussion *supra*, pp. 42-44 and ftn. 73.

[97] See discussion *supra*, pp. 42-45, see also Appendix "A", pp. 8A-9A, *infra*.

[98] See *supra*, pp. 23-25 and ftn. 21.

common law employees. No social or economic purpose under the statute is served by expanding the term "employee" beyond the limits fixed by Congress simply to include these self-employed fishermen as employees. By petitioner's amorphous standards respondents and others are provided no stated rule by which to determine their obligations under the Act. They must guess themselves to be subject to an uncertain rule or be at their peril which would impose administrative duties, civil and even criminal sanctions that may involve imprisonment for a felony. 26 USC § 7702. See, S. Rept. 1255, Appendix B, p. 1763, *infra*.

The questions respecting inclusions and exclusions in making determinations is for the Congress to answer, not the courts or the administrative agencies. If petitioner's broad test is adopted, then everyone who earns money performing a service for another is, by petitioner's definition, the latter's servant.

We do not deny the petitioner's basic premise of the law's capacity for growth which must include the creative work of judges. (Pet. Br. p. 14) But in the federal scheme the court's work outside of the constitutional area is modest, particularly in the freedom to create new common-law liabilities beyond the reach of the statute and Congress' clear purpose. See, *United States* v. *Standard Oil Co.*, 332 U.S. 301, 313. The tort law analogies petitioner brings forth are surely not to secure a new step forward in expanding the recognized area for applying settled principles of that law as such. It is advanced rather as an instrument for determining federal fiscal and regulatory policies, by the shifting of tax incidence, which the government's executive arm thinks should prevail in a situation not covered by existing established tax liabilities. *United States* v. *Standard Oil Co.*, *supra*, 332 U.S. at 314. Whatever the merits of such a policy, its conversion into law is a proper subject for congressional action and not for any creative power of the Court. "Con-

gress, not this Court * * * is the custodian of the national purse. By the same token it is the primary and most often the exclusive arbiter of federal fiscal affairs." *United States* v. *Standard Oil Co.*, *supra*, p. 314.

Moreover, Congress has been conscious throughout the history of the Social Security Act that the executive agencies have either, (1) invaded its domain by administrative fiat to effect change in defining "employees" for tax purposes, or (2) repeatedly proposed legislation for expanding the definition. At any rate, the situation is not so new that Congress can be presumed *not* to have known or acted in the light of that knowledge. The Congressional repudiation of this Court's "economic reality" test in *Silk* and *Greyvan* was acknowledged in *James* v. *United States*, 366 U.S. 213 at 231 (separate opinion) stating:

> "When Congress is dissatisfied with a tax decision of this Court, it can and frequently does act very quickly to overturn it."

A number of such instances were specified, including, "*United States* v. *Silk*, 331 U.S. 704 ('employees' for purpose of Social Security employment tax) led to Joint Resolution of June 14, 1948, c. 468, 62 Stat. 438, amending several sections of the 1939 Code." *James*, *supra*, 366 U.S. at 231, ftn. 13.

In view of these considerations, an exercise of judicial power urged by the petitioner would not only intrude into a field properly within Congress' control, but it concerns action which Congress has seen fit not to take.[99]

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[99] See discussion pp. 45-46 supra, and opinion below R. 359 and ftn. 2, 3.

f. Neither the absence of a demise charter nor the respondents' possible liability to third parties for acts of the crew render respondents liable for the FICA and FUTA taxes in issue.

It is petitioner's unalterable view that respondents' tax liability and their obligation to the fishermen for maintenance and cure are so intertwined that one exists only because of the other. (Pet. Br. pp. 18, 19-20). Petitioner's selection of the legal consequences of a demise charter demonstrates the fallacy of its rigid theory. (Pet. Br. pp. 19-20 ftn. 10). The demise charter shifts incidents of ownership to a charterer much like a lease of real estate shifts them from a lessor to a lessee.

Under a demise charter the charterer becomes the "employer" for purposes of liability to seamen under the Jones Act, and generally for maintenance and cure because he hires the crew. Gilmore and Black, *The Law of Admiralty* (1957 ed.) p. 218. While relevant, the absence of a demise charter is not decisive when determining "employer" status for employment tax purposes under the traditional common law rules. In less than a demise charter the nature of the contractual arrangements determine the employer-employee relationship. See, Gilmore & Black, *The Law of Admiralty*, *supra*, p. 170 re, "voyage" or "time" charters. The absence of a demise charter between the respondents and the captains does not exclude the existence of a bailment for the mutual benefit of the parties,[100] nor, under the District Court's findings[101] is a vendor-vendee relationship precluded. Neither of these relationships are consistent with one of employer and employee at common law. Petitioner's failure to distinguish the separate concepts of "employee", as they exist under a demise charter on the one hand and under tax law on the other, may lead to

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[100] See, 8 Am. Jur. 2d, Bailments. § 4, pp. 907-908, 913, 914.

[101] Fdgs. No. 8, R. 317: No. 15, R. 320: No. 38, R. 329.

absurd results in other pursuits. It would be a strange law indeed which would first require a subcontractor in the building trades, for example, to lease the premises upon which he performed his subcontract work lest he lose his independent contractor status and become the employee of the owner. Fishermen, under the arrangements outlined in the Court's Findings below, are in no different position.

Petitioner cited several maritime cases as authority for the proposition that a boatowner may be generally liable to third parties for the acts of the crew in the absence of a demise charter. (Pet. Br. p. 24). Possibly respondents may be found liable, "[i]f so, * * * this liability would be predicated on the doctrine of estoppel, or a holding out to the public * * *. In any event these considerations are in no way determinative of the actual relationship [between respondents and the captains] for the nature of that relationship stems from the contract between the parties." *Magruder* v. *Yellow Cab Co.*, 141 F.2d 324 (CA-4).

Generally, it may be stated that while common factors (employment relationships) may emerge from maritime and tax questions, "they are, nevertheless, distinct questions involving independent considerations." See, *Local 1976, UBC & J.* v. *NLRB*, 357 U. S. 93, 111. Under the common law test one may be an independent contractor for this tax purpose, and yet, he may be an employee under maritime standards when maintenance and cure is the issue. See, *NLRB* v. *Hearst Publications, Inc.*, *supra*, 322 U.S. at 122.

g. If the Fishermen (Captains and Crewmen) are not Respondents' Employees, it does not follow that the Crewmen are the Captain's Employees.

A matter beyond the scope of this case and the record is raised by the petitioner, as a basis for decision, respecting purported tax liabilities of the captains, al-

though they are not parties to this suit. (Pet. Br. p. 22) Petitioner contends that "[i]f the owner did not have the burdens of the Social Security laws placed upon the 'employer', then the captain would have them, for he would *necessarily* be the employer of the crewmen." [emphasis added] (Pet. Br. p. 22) No authority is cited suggesting a contingent tax liability under the Federal Insurance Contributions Act (26 USC 3121 et seq.) or the Federal Unemployment Tax Act (26 USC § 3306 et seq.) The law is to the contrary. In a recent case, a Court[102] rejected the government's contention that a fishboat captain's liability for employment taxes on the crew would mechanically follow from proof of a boatowner's nonliability for such taxes on the fishermen (captains and crewmen). This was because the crewmen may not be anyone's employees. The Court held that the captain's liability for taxes, as an employer, on the crew's earnings depended solely on whether the government could establish facts bringing the captain-crew relationship within the applicable tax statute. "There is no such thing as a conditional tax statute." *Joe Grasso & Son, Inc.* v. *United States*, 42 FRD 329, 333, affirmed, 380 F.2d 749 (CA-5).

h. The Fifth Circuit's Decision below cannot jeopardize the Application of the National Labor Relations Act to any Industry.

There is no basis for petitioner's suggestion that the fishermen's status as independent contractors under the Social Security Act will disrupt the maritime industry's remedies under the National Labor Relations Act. (Pet. Br. pp. 24-25)

Several cases before the Labor Board dealt with the same issue and in nearly all instances, by our study, the Board, under similar conditions, held the fishermen were

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[102] *United States* v. *Joe Grasso & Son, Inc.*, 380 F.2d 749, 751 (CA-5).

independent contractors and not the owners' employees.[103] These conclusions were reached although the Board found that social security and unemployment taxes were withheld and paid over.[104] Holding the fishermen were the owners' employees, the Board, in one instance, observed that employment taxes were not being withheld.[105]

In a number of cases the Department of Justice obtained indictments and successfully prosecuted violations of the anti-trust laws resulting in convictions of boatowners and fishermen. It was material to the success of the prosecutions that the indictments allege and the evidence establish that the fishermen operating the boats were not the owners' employees, but independent contractors.[106] See, *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 5 ftn. 4.

These decisions have no decisive effect in this case, but serve to attest the fact that agencies of the government are resolving similar issues in a way which is consonant with the Fifth Circuit's decision here.

The National Labor Relations Act excludes supervisory personnel from its definition of "employee". [29 USC § 152(3)]. The object of the law was to aid the wage earner, not unionize foremen. [H. Rept. No.

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[103] *Alaska Salmon Industry, Inc.* (3 cases), 81 NLRB 1335, 82 NLRB 1056 and 110 NLRB 900; *J. Howard Smith, Inc.*, 95 NLRB 21; *F. H. Snow Canning Co., Inc.*, 118 NLRB 284; *contra, Southern Shellfish Co., Inc.*, 95 NLRB 957.

[104] See, *Alaska Salmon Industries, Inc.*, 81 NLRB 1335, 1337.

[105] *Southern Shellfish Co., Inc.*, 95 NLRB 957, 963.

[106] *Gulf Coast Shrimpers & Oystermen's Ass'n.* v. *United States*, 236 F.2d 658 (CA-5). cert. den. 352 U.S. 927 (income and social security taxes were nevertheless being withheld [p. 661]). *Local 36 of the Int'l. Fishermen's Union* v. *United States*, 177 F.2d 320 (CA-9). cert. den. 339 U.S. 947: *Atlantic Fishermen's Union, et al* v. *United States*, 197 F.2d 519 and 195 F.2d 1021 (CA-1). The indictment, Criminal No. 51-380, in the Mass. District Court, charged that the fishermen working for boatowners "are not employees, workers or laborers but independent businessmen * * *."

245, 80th Cong., 1st Sess. p. 18] Yet under the Social Security Act, such foremen or supervisors are clearly common law employees. Income withholding taxes and social security taxes must be withheld from their earnings and paid over to the District Director of Internal Revenue along with the taxes withheld from wage-earners covered as "employees" under the National Labor Relations Act. This apparent inconsistency does no violence to either the Social Security Act or the National Labor Relations Act.

Petitioner's notion that if one is an "employee" under the Social Security Act, he must be an "employee" under the National Labor Relations Act leads to absurd results. Today, under the Social Security Act, domestics are considered employees of the householders who hire them.[107] Domestics are not employees under the National Labor Relations Act.[108] The stability of neither Act has been shaken because of this inconsistency. A principle applicable here was stated by this Court in *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 173:

> "* * * nor should a determination under one statute be mechanically carried over into the interpretation of another statute involving significantly different considerations and legislative purposes."

III

a. The findings and conclusions of the District Court affirmed by the Court of Appeals were amply supported by the evidence.

Petitioner submits that on the basis of the undisputed facts the decision should be reversed. (Pet. Br. p. 25). While stating that the facts are undisputed,

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[107] § 3121(a)(7) Internal Revenue Code; 26 CFR § 31. 3121(a)(7).

[108] 49 Stat. 450 § 2, amended by § 101, 61 Stat. 127. 29 USC § 152(3).

petitioner argues, in essense, that the facts were otherwise than as found by the Court. In addition, petitioner ignores the application of the common law control test and invokes principles of workmen's compensation, citing as its sole authority Judge Learned Hand's opinion in *Lehigh Valley Coal Co.* v. *Yensavage*, 218 Fed. 547, 552-553 (CA-2). (Pet. Br. pp. 25-26) Material to petitioner's case, Judge Hand there said, "the word 'employed' * * * must be understood with reference to the purpose of the Act, and where all conditions of the relation require protection, protection ought be given." (*id.* at 552) The legislation under consideration in *Lehigh Valley Coal Co., supra*, was an employer's liability statute. The protection sought was relief from economic and financial catastrophe growing out of an industrial accident. The test applied was "economic reality" or the "nature of the work" to give vitally to the purposes of the legislation. As to each, the factor of "control" was de-emphasized, if not altogether ignored.

Judge Hand's decision in *Lehigh Valley Coal Co., supra*, was not inconsistent with Judge Hand's later decisions in *Texas Co.* v. *Higgins*, 118 F.2d. 636 (CA-2), and *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715 (CA-2), in which he interpreted the same term (employee) somewhat differently under the Social Security Act. At 135 F. 2d p. 717 he said:

> "The test lies in the degree to which the principle may intervene to control the details of the agent's performance; and that in the end is all that can be said * * *."

The language of this attractive authority was adopted by the Congress as controlling in determining employer-employee relationships under the Social Security Act. See, S. Rept. No. 1255, Appendix B, pp. 1755-1756, *infra*.

Stating there was no dispute as to the facts, petitioner nevertheless ignored many of the District Court's findings and disparaged others. On agreed facts, petitioner

drew inferences inconsistent with those drawn by the Trial Court. Basically, petitioner raised questions whether the evidence sustained the Court's findings. No question raised by petitioner has an existence independent of it. The issue does not go merely to some definite disagreement with one established fact (see Pet. Br. p. 31, fn. 14), but extends to almost all the material matters found by the Court. Petitioner says, in effect, that the Trial Court ignored substantially all of the facts which the Government deemed significant. See, *United States* v. *Yellow Cab Co.*, 338 U.S. 338, 339-340.

For some reason, petitioner assumes that despite the requirements of Rule 52(a), Federal Rules of Civil Procedure, the Government is entitled to new findings. "It ought to be unnecessary to say that Rule 52 applies to appeals by the Government as well as other litigants." *United States* v. *Yellow Cab Co.*, *supra*, 338 U.S. at 341. Nor may findings of fact, under Rule 52(a), be casually discarded even if the facts may have been differently found. *United States* v. *Real Estate Boards*, 339 U.S. 485, 495; *United States* v. *Yellow Cab Co.*, *supra*, 338 U.S. at 342.

A finding is "clearly erroneous" only when the "reviewing court, on the entire evidence, is left with the definite and firm conviction that a mistake has been committed." *United States* v. *U. S. Gypsum Co.*, 333 U.S. 364, 395. "It is not enough to choose between the two permissible views." *United States* v. *Yellow Cab Co.*, *supra*, 338 U.S. at 342.

Against the background discussed in this brief, the facts, in essence, disclose an oral contract between the respondent boatowners and the captains. By its terms, the respondents relinquished control of their boats to skilled and knowledgeable captains who staffed and provisioned them at their own expense as they saw fit. Under the arrangements, the captains undertook the fishing operations without interference from the owners as to the

captain's manner, means and methods of performance. Without a guarantee of any kind, the captains agreed to conduct the operations for a season and sell their catches to the respondents on delivery at a specified fish meal processing plant. Respondents' only concern was to obtain large catches of marketable quality fish.

Subject to the necessity for delivering the catch to a plant at the end of a trip, the captains decided the hours of work and chose the areas for fishing they considered most productive.

Each captain made business decisions in his separate negotiations with the owners. The purchase price was decided after a bilateral agreement on the terms of sale. The charges for food and personal gear made against the boat were the captain's personal debts. All payments to the crewmen were the captain's responsibility based upon his separate negotiations with them. Care had to be exercised to avoid spoilage of the fish. Like other independent contractors, a captain's profit or loss was attributable, in large part, to the way in which he combined efficiency and economy in managing his vessel. A captain was paid nothing unless a catch was delivered regardless of the time or effort expended. The fish did not become the property of the respondents until delivered to the processing plant. (Fdg. 38, R. 329)

There was no indication in the Social Security Act "* * * that Congress intended to change normal business relationships through which one business organization obtained the services of another to perform a portion of production or distribution". *United States* v. *Silk, supra* 331 U. S. at 714. "Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without the assistance of independent contractors. * * * Where part of an industrial process is in the hands of independent contractors, they

are the ones who should pay the social security taxes". (*id*, at p. 714).

Control—The element of control discussed by petitioner (Pet Br. p. 26) is emphasized in the Regulations. Control of the manner and method of performance needs little discussion here. The captains' contract was to produce a specified result; the will of the respondents was represented only in the result of the work, and not in the means by which it was accomplished. *Casement* v. *Brown*, 148 U.S. 616, 622. This principle, supported by the record, gave the captains a status of independent contractors.

It was obvious from its findings that the District Court had the common law test clearly in mind. For example, it found the "respondents had no right to nor did they attempt to instruct a captain or crew as to their actual fishing activity" (Fdg. 27, R. 235); and that respondents did have the right to control the result of a captain's work and interfered in the process to some degree to assure a proper result from the undertaking." (Fdg. 46, R. 333) But, "* * * Some supervision is inherent in any joint undertaking and does not make the contributing subcontractors employees." *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715, 717-718 (CA-2).

Statements of witnesses attested to the independence of the captains. Typical were these: "The captains really run the show out there" (R. 112); "Yes sir, it was up to me. I was in charge of the whole thing. * * * The company didn't have nothing to do with it." (R. 224-225)

The restrictions imposed here (Pet. Br. p. 27) were natural ones that would be written by any careful owner into a contract; restrictions that would be for the protection of an owner's property. For instance, the right to forbid liquor aboard a ship is a most natural restriction in a hazardous seafaring occupation. Also, due to con-

servation laws affecting the industry, respondents were justified in warning against violations to avoid fines and possible confiscation of the catch or the boat itself.

Petitioner's emphasis on respondents' publication of crew pay scales and their requirements of crew sizes are not decisive. (Pet. Br. p. 27) The contention loses much of its force when the basis for these arrangements is understood. The necessity for the practice of fixing a crew pay scale developed from an understanding between the boatowners and captains operating in a fleet out of common plant facilities to avoid disruption caused by competitive bidding for the men's services. (R. 96-97, 98, 198 and ftn. 6 *supra*, p. 7) This practice may have had antitrust significance but would seem to have little bearing on the problem here. See, *United States* v. *Real Estate Boards*, *supra*, 339 U.S. at 490-491. At any rate, the captains frequently paid some men more if they desired.

The crew size of about 24 men was basic to safety as well as successful fishing operations where the nets had to be hauled in by hand by "bunt pullers." (R. 98) Here too, the captains increased or decreased the crew sizes within reasonable limits according to their needs. All this affected the results of the undertaking, not the manner or method of its performance.

That the captains could and did oppose the respondents and affect changes respecting the pay scales and crew size determined by the respondents indicated an independence of, or perhaps an opposition to, the wishes of the respondents. The foregoing is inconsistent with the tighter control exercised in normal employer-employee relationships. It is important "to distinguish between authoritative direction and control and mere suggestions as to details or necessary cooperation." *Standard Oil Co.* v. *Anderson*, 212 U.S. 215, 222.

Contrary to petitioner's views, the Trial Court found that the captains kept a daily payroll record of the

amounts to be paid each crewman, the latter's participation in each catch, and, the amounts to be charged against him for food and personal gear. The plant's office compiled the data into a summary record. (Compare Pet. Br. p. 27 and Fdg. 37, R. 328-329) The bi-weekly payments to the crewmen by respondents' checks were drawn from the captain's money, received for the sale of the fish, in such amounts as the captain designated. These accommodations and conveniences had no bearing on the captain's complete control over the manner and method of conducting his fishing operations. See, *Phinney* v. *Southern Warehouse Corp.*, 212 F. 2d 488, 489-490 (CA-5); *Venneri* v. *United States*, 340 F. 2d 337, 341 (Ct. Cl.).

Right of Discharge—Petitioner's emphasis on respondents' "power to terminate," as "one of the most crucial elements in the arsenal of control" (Pet. Br. p. 28), is misplaced. Primarily, petitioner's views disparage the Court's findings (Fdg. 13, R. 320, and Fdg. 47, R. 333), and are otherwise unrealistic. Petitioner says that the parties' arrangements contemplated a right in the respondents "to terminate the captains' or crews' jobs at any time for any reason * * * or without a reason." (Pet. Br. p. 28) This will not withstand analysis.

The Court found that the contract could be terminated only at the conclusion of a trip, each trip being a separate undertaking. But the evidence disclosed that no terminations occurred at any time prior to the end of a season (Fdg. 13, R. 320, Fdg. 47, R. 333), and custom dictated "it to be continued for a season." (Fdg. 13, R. 320) But apart from these considerations, a termination in mid-season would more likely initiate with a captain than a boatowner. This result would follow from his ill health, the dispersing of his crew or the disappearance of the fish. These circumstances would make further fishing impossible. On the other hand, it would be a poor business judgment for an owner "with or without a reason"

to indiscriminately discharge a captain and crew in mid-season. The only result would be to render inoperative an otherwise productive vessel. There would be little hope of finding a captain and crew organized and available at any time except at the commencement of a season.

All that appears in the evidence upon which the Government relies to support its contention is that an owner had a right not to give a captain a vessel the next season if he chose not to do so. (Fdg. 47, R. 333) "This is not the equivalent of evidence of a right to fire [a captain] from a job once he had begun to work on it. It is only evidence of the right not to enter into another contract." *United States* v. *Thorson, supra*, 282 F. 2d 157, at 164. Also, *Party Cab Co.* v. *United States, supra*, 172 F. 2d 87, 93. Other contentions made by petitioner rest on facts not found by the Court but which it says are compelled by the evidence. (Pet. Br. p. 28)

But, terminations without notice do not mechanically transform an independent contractor into an employee where there is a failure of performance as agreed upon. *Chicago, Rock Is. & Pac. Ry. Co.* v. *Bond*, 240 U.S. 449, 455. This Court held van drivers were independent contractors under the Social Security Act in *United States* v. *Silk, supra*, 331 U.S. at 709, saying: "The contract was terminable at any time."

But more important, the covenants between the owners and captains, grounded in custom, did not contemplate the captains as servants subjecting themselves to momentary superintendance. Their undertaking was distinctly one capable of independent action to be judged by results covering a "fishing season." The bonus arrangement at the outset, payment of which was held in abeyance until season's end, was inconsistent with petitioner's notions of brief or temporary employment. The captains were not mere sailors on articles at fixed wages under an owner's orders. They were independent operators, each with an organization of his own, conscious of his own

power to direct operations and negotiate the sale of the fruits of his efforts. He displayed a readiness to assume direction of an enterprise and to be judged by its results.

Petitioner's comparison of the employment of a plant superintendent of a large corporation (Pet. Br. pp. 22, 29) or a department store clerk at Christmas time (Pet. Br. p. 30) with the captains is neither similar nor analogous. Unlike the captains, neither of them sell a product they themselves harvested from the sea; nor do they, like the captains, labor long hours and possibly days without hope of reward should nature's cycles, weather or other unknown events deprive them of the object of their endeavors. Unlike the plant foreman and the clerk, the captains have no regular hours set by the company, nor wages guaranteed irrespective of production together with overtime pay on occasion. The mere existence of the branch factory (Rev. Rul. 69-315, Pet. Br. p. 29) implies an overall organization from which policy and direction as to detail emanates to assure uniformity in the organization's activity.

Investment—While relevant, the furnishing of facilities for the performance of the work is not decisive. Although the boatowners invested thousands of dollars in their vessels, yet the investment was relative as to the captains who paid a portion of the expenses of the trip (groceries and personal gear), and gave unstintingly of their time and skill without a guarantee of earnings. The disparity of money investment loses its significance knowing that the respondents incur none of the fixed labor costs found to be a major expense of operation in other occupations. It was solely the captain's problem to hire and satisfy 20 to 24 crewmen that the venture would succeed. The captain's failure to produce a catch imposed a loss of time and expense on the fishermen with no reward. The owners' cost would be only the general maintenance expenses. When the catch was large, the captains realized an agreed amount from its sale to

the owners. Out of this all crew and provision expenses were paid. The owners' expenses were still limited to the vessels' maintenance and repair. The contributions of all to the venture were great although different. Many joint undertakings are so arranged.

There are many contractual arrangements involving large investments by businesses with little or none by the independent contractor performing necessary services. The disparity, in itself, does not mechanically change the self-employed into employees.

The interpretations placed by the Commissioner of Internal Revenue upon the definition of "employee" involved here demonstrate that a taxpayer's investment in the facilities for the performance of the work is not decisive.

The Commissioner acquiesced in a number of court decisions and published his tax ruling holding taxicab drivers were independent contractors.[109] The enormous cost of the taxicabs, garage, telephone and service facilities were literally ignored in making the determinations that the drivers were independent contractors. Another group of acquiescences and a subsequent published ruling[110] held real estate salesmen were not employees. Here too, the large investment by the real estate firms in their facilities used by the salesmen had no bearing on the Commissioner's decision. The pertinent language bearing on the independent contractor status was:

> "Here we are concerned with competent salesmen, almost entirely dependent upon their own initiative, efforts, skill and personality for success, working upon their own time, at their own expense, and deriving remuneration from the results of their work." [*Dimmitt, et al.* v. *Finnegan*, 179 F. 2d 882, 888, *cert. den.*, 340 U.S. 823]

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[109] 1951-2 Cum. Bull. 162-168.

[110] 1951-1 Cum. Bull. 108-109.

Pertinent to this issue is the decision in *Radio City Music Hall Corp.* v. *United States, supra*, 135 F. 2d 715. The Court held stage performers were not the theater's employees under the Social Security Act. When the determination was made, no weight was given to the taxpayer's huge investment in its New York theater building and facilities where the actors performed their services. (135 F. 2d at 716-717)

Another illustration, in a non-tax case was a contractee's operation of a bus terminal and facilities for a national organization. *Continental Bus System, Inc.* v. *N.L.R.B.*, 325 F. 2d 267 (CA-10). The contractee, like the captains here, hired his own workers and arranged their pay and duties. His earnings, like the captains', were derived solely from commissions on the tickets and other services sold to the public. The company provided the terminal, buses, tickets, forms and all other facilities necessary for a successful transportation operation. Under the common law control test, the contractee was held an independent contractor and not an employee of the bus company. The owners' investment in the transportation facilities far exceeded those of the respondents' in their boats; also, there was a greater measure of control exercised over the contractee than respondents would attempt over the captains.

The furnishing of a place to work, the open sea, was dictated by the presence of the fish. The actual fishing grounds were the separate choices of the captains. No greater independence than these captains pursuing their living is conceivable. It is apparent that there is still room in this world for a man to pursue an "independent calling" and yet share in the benefits granted under the Social Security Act.

Profit or Loss—Petitioner says, "The captains and crews had no opportunity to share in the profit or loss of the enterprise". (Pet. Br. p. 29). We disagree.

The captain's ability, as a businessman, to gain or lose from his own undertaking was discussed briefly at pp. 67-68, *supra*. Clearly, the captain would gain a profit or bear a loss after payment of the crew's earnings and payment of accrued expenses. This was so irrespective of a gain or loss by the respondents from their sale of the fishmeal product on the open market. (Fdg. 8, R. 318). As for the risk involved, we know of no other class of persons who risk so much in a hazardous occupation on the chance that they will realize great profits or nothing from earnest efforts. Success or failure depends upon finding the fish and harvesting them; this, in turn, depends upon weather, efficiency of the boat's gear, its capacity, the migration habits of the fish, nature's cycles and other events, some foreseeable, others not. The fishermen may return empty handed or be handsomely rewarded. There was no guarantee of any kind.

Permenance of the relationship—The District Court found that some captains fished single seasons and others consecutive seasons for various respondents, there being no pattern of continuity of relationship between particular captains and particular respondents. (Fdg. 18, R. 321-322). They were not restricted in their right to conduct similar operations for various competitors. (Fdg. 47, R. 333) The petitioner took exception to the Trial Court's findings, asserting that the evidence was to the contrary. Petitioner contends: "* * * the relationship between the captains and the owners manifested a high degree of permenance. The relationships * * * ranged up to 40 years * * *". (Pet. Br. pp. 3 and 30).

To support these contentions, petitioner studiously avoided the colloquial realities of the testimony, favoring instead selected words and phrases from the whole evidence.

The witnesses alluded to the "Wallace interests" or the "Wallace people", the "Wallace fleet", or the "Com-

pany" when discussing their fishing activities.[111] (R. 162, 163, 166, 167, 174-175, 178, 183, 184, 187, 213, 221). The boats, owned by various persons, including these respondents, operated in fleets out of one or more plants to which the fish catches were returned. It was from these plant "interests" that the witnesses testified they conducted their fishing activities for up to 40 years. (Fdg. 10, R. 318; Fdg. 11, R. 319; Fdg. 18, 321-322). Boat owners, including the respondents, come and go in the business, but the permenance of the processing plants give the menhaden business its continuity. The processing plants are not parties to this suit. (Fdg. 11, R. 318-319).

Each season was a separate and complete arrangement between the captains and respondents. (Fdg. 13, R. 320, Fdg. 20, R. 322). As to permenancy of the relationship, "* * * it can hardly be said to exist or be a weighty element where each obligation was for a comparatively short duration and the worker was free to accept or reject the offer of a new or similar obligation." *Silver* v. *United States*, 131 F. Supp. 209, 212 (N.Y.) and *Illinois Tri-Seal Products, Inc.* v. *United States*, supra, 353 F.2d at 229.

b. The Court of Appeals having treated the case as an issue of fact rather than a question of law, correctly affirmed the District Court's findings of fact under Rule 52(a) of the Federal Rules of Civil Procedure.

Petitioner's Point III (Pet. Br. p. 31-38) frames the issue as a pure question of law, asserting that the "the Court of Appeals applied an erroneous standard for review". (Pet. Br. p. 31).

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[111] George Wallace owned a fishmeal processing plant in North Carolina and had an interest in others in Florida and Louisiana out of which respondents' boats operated. He was the operating manager in each of them. (R. 83-84)

"I was on a boat fishing for Mr. Wallace but he did not own the boat". (R. 162).

The two Courts below having found favorably for the respondents, it is axiomatic that the trial court's findings of fact are accepted as true, that all conflicts in the evidence must be presumed to have been resolved in favor of the respondents, that the evidence otherwise must be considered in a light most favorable to the respondents and that respondents are entitled to all favorable inferences which may be drawn from the evidence and circumstances proven. "It must be a strong case in which this Court will set aside these concurrent findings of two courts." *Goodyear Tire and Rubber Co.* v. *Ray-O-Vac Co.*, 321 U.S. 275, 278. *Texas and New Orleans Ry. Co.* v. *Brotherhood of Railway and S. S. Clerks*, 281 U.S. 548, 557. We think this is not such a case.

The Circuit Court below affirmed the District Court on the authority of *CIR* v. *Duberstein*, 363 U.S. 728, which requires that reviewing courts must affirm unless it can be said that its basic findings were clearly erroneous under Rule 52(a) F. R. Civ. P. (R. 365).

The petitioner insists, though not too confidently, that *Duberstein, supra*, did not state a standard of review applicable to every tax case, and, that therefore "the *Duberstein* decision cannot be applied here". (Pet. Br. p. 32).

If the findings below would have been the other way, the petitioner would be here strenuously contending the issue was one of fact, and, unless "clearly erroneous", the findings should be left undisturbed by virtue of Rule 52(a). We point to at least three recent employment tax cases favorable to the Commissioner, where the taxpayers, on review, sought reversal contending as a matter of law that the Courts should have ruled the workers were independent contractors.[112] The reviewing courts in

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[112] *Lifetime Siding Co.* v. *United States*, 359 F.2d 657 (CA-2) cert. den. 385 U.S. 921 (siding applicators); *Service Trucking Co.* v. *United States*, 347 F. 2d 671 (CA-4) (truck unloaders); *Hoosier Home Improvement Co.* v. *United States*, 350 F.2d 640 (CA-7) (window installers).

each case disagreed with the appellant-taxpayers that the employment status of the workers was a question of law.

In the cases cited in the margin (ftn. 112), the government successfully argued that employment relationships, under the Social Security Act, were issues of fact and that where the facts were not in dispute reasonable minds could differ whether the workers were employees or independent contractors. The government would then conclude by stating that the records contained probative evidence capable of supporting the decisions of the trial court. In each instance the government cited *CIR* v. *Duberstein*[113] as applicable. While leeway is accorded the Commissioner when assuming inconsistent positions in tax matters, the choice of *Duberstein* as the vehicle is not convincing.

It is urged that this case involves a "mixed" question of law and fact and as such should be treated as a question of law. (Pet. Br. p. 33-36). Whether the issues here are mixed questions of law and fact was previously considered in a fisherman tax case by the Fifth Circuit in *United States* v. *Crawford Packing Co.*, 330 F.2d 194; Holding they were not employees the court said at page 197:

> "Whether applicable statutes and regulations are such as to preclude the decision of the District Court is a question of law reviewable on appeal. So far as the fact elements are concerned, reviewing courts are bound by the clearly erroneous rule. If, as may

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[113] *Lifetime Siding Co.* v. *United States, supra,* ftn. 112 see page 2 of Governments' memorandum in opposition to petition for a writ of certiorari, No. 461, October Term 1966. Reference is made to "(Pet. A 21)" which is the Circuit Court's opinion citing *Duberstein* at length.

Service Trucking Co. v. *United States,* supra, ftn. 112 see Government's brief, page 9, citing *Duberstein* at great length as controlling on the issue of fact.

Hoosier Home Improvement Co. v. *United States,* supra, ftn. 112 see Government's brief at pages, 14 and 31, citing *Duberstein.*

often happens in this kind of case, the facts had been found by a jury, the scope of review would be even more strictly limited by the substantial evidence rule. The Supreme Court noted in *Trust of Bingham* v. *CIR*, 325 U.S. 365, 370:

> 'And even when they are hybrid questions of 'mixed law and fact' their resolution, because of the fact element involved, will usually afford little concrete guidance for future cases, and reviewing courts will set aside the decisions of the Tax Court only when they announce a rule of general applicability, that the facts found fall short of meeting statutory requirements.'"

It cannot be said that the findings of fact here are "clearly erroneous" under the application of §§ 3121(d) and 3306(i) Internal Revenue Code. Rule 52(a) F. R. Civ. P.

Petitioner misreads *NLRB* v. *United Insurance Co.*, 390 U.S. 254 (Pet. Br. p. 34-35) as supporting plenary review to disturb the concurrent findings of two courts below. This Court overrode the Court of Appeals' decision in *NLRB* v. *United Insurance Co. supra*, and restored the findings of the original trier of fact. The Court's respect for the findings of the trier of fact made "between two fairly conflicting views" (390 U.S. at 260), is no comfort to the petitioner who asks this Court to disregard the facts and conclusions twice sifted by the two Courts below. This Court plainly indicated that determinations whether persons are employees or independent contractor are issues of fact. At *id.*, 390 U.S. p. 258:

> "There are innumerable situations which arise in the common law where it is difficult to say whether a particular individual is an employee or an independent contractor * * *. [T]here is no shorthand formula or magic phrase that can be applied to find the answer, but all incidents of the relationship must be weighed with no one factor being decisive."

And concluding at *id.*, 390 U.S. p. 260:

> "Here the least that can be said for the Board's decision is that it made a choice between two conflicting views * * *."

As a basis for a *de novo* review of the facts, petitioner seeks comfort in *United States* v. *Silk*, *supra*, 331 U.S. at 716-718 and *Bartels* v. *Birmingham*, *supra*, 333 U.S. at 132 (Pet. Br. p. 36). It must be remembered that this Court sustained the District Courts and the Circuits in three out of four of the categories of workers under review.[114] Holding coal loaders were employees by application of the common law tests, this Court observed in *Silk*, 331 U.S. at 716: "Silk was in a position to exercise all necessary supervision over their [coal loaders] simple tasks". The other three categories were held not to be employees under the same common law rules. Review was granted by this Court in *Silk* and *Bartels* because "varying standards (for the determination of "employees") have been applied in the federal courts" (331 U.S. at 705), and further, "no definition of employer or employee applicable to these cases occurs in the Act". (331 U.S. at 711). Those conditions no longer exist since the "Gearhart amendment" of 1948 which legislated into existence an unambiguous definition of "employee". §§ 3121(d) and 3306(i), Internal Revenue Code, at Appendix A, pp. 1A, 2A, 4A infra. (Discussed *supra*, pp. 33-35).

Employment relationships were considered factual type cases by this Court in *Silk*, 331 U.S. at p. 721 (separate opinion). Mr. Justice Rutledge admonished against this Court's drawing final decisions in such cases saying (331 U.S. at 721):

> "Having declared the applicable principles to be applied, our function is sufficiently discharged by seeing to it they are observed."

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[114] Coal truck drivers and furniture van drivers in *Silk* and *Greyvan* (331 U.S. 704) and musicians in *Bartels* (332 U.S. 126) held not employees of the taxpayers.

All that can be said here is that the trial judge and the Circuit Court below looked at the facts one way, while petitioner, construing them in another, asks this Court to agree with the government's view. If there is any class of cases which plainly falls outside the considerations by which this Court exercises its discretionary jurisdiction, it is those involving service relationships respecting only an interpretation of facts found by the trier of fact bearing on the existence or absence of control exercised by one individual over work performed by another.

This case presents no constitutional principle so closely connected to the facts of the case to warrant dispensing with the conventional rule of this Court which usually precludes review of the concurrent findings of two courts below. Compare, *United States* v. *Appalachian Elec. Power Co.*, 311 U.S. 377, 404. In point see, *Corn Products Ref. Co.* v. *CIR*, 350 U.S. 46, 51 and *Comstock* v. *Group of Institutional Investors*, 353 U.S. 211, 214. Also, this Court will accept a finding as to "unreasonableness of an assessment" for public improvements concurred in by two courts unless shown to be clearly erroneous. *Road Improvement District* v. *Missouri, Pac. Ry. Co.*, 274 U.S. 188, 199. "Employee" or "independent contractor" status is no less a factual issue.

Congress admonished the executive agencies to follow the common law rules in the Treasury regulation which was basic to this Court's decisions in *Silk* and *Bartels*. In this light, the Committee Report stated that—(Sen. Rept. No. 1255, see Appendix B, p. 1758).

> "• • • properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity." (Pet. Br. p. 37).

Petitioner says this requires that all employment relationships shall be treated as questions of law free from the influence of a fact finder's discretion. (Pet. Br.

p. 37). Such reasoning, does not square with this Court's holding in *Baker* v. *Texas, Pac. Ry. Co.*, 359 U.S. 227. The issue there was whether, as a matter of law, a certain individual was an "employee" under the Federal Employer's Liability Act. This Court said, 359 U.S. at 228:

> "* * * we think it is perfectly plain that the question * * * contains factual elements such as to make it one for the jury under appropriate instructions as to the various relevant factors under law. * * * Only if reasonable men could not reach differing conclusions on the issue may the question be taken from the jury."

In situations where a decision is so dependent upon inferences to be drawn from the facts of each case, the desired uniformity of decision urged by petitioner can be achieved only by application of the appropriate legal rules, whether by a judge as the trier of fact or by the jury under proper instructions.

The foregoing principle is borne out by the authorities cited in petitioner's brief at pp. 37-38, demonstrating that contrary results are often reached in similar type situations. Holding fishermen were employees, *Capital Trawlers* v. *United States* [115] typically reconciled opposite conclusions reached in two Fifth Circuit cases, stating [216 F. Supp. at 445]:

> "Since each of these cases is to be governed by its special facts, cases involving different factual situations 'provide little guidance'. * * * It was materially different from the relationships held not to constitute employment relationships under the same statutes in * * * *Williams Packing and Navigation*

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[115] Cited at Pet. Br. pp. 36-37, 216 F. Supp. 440 at 445, aff'd. *per curiam*, 324 F.2d 506 (CA-1). This case distinguished *Williams Packing and Nav. Co.* v. *Enochs*, 291 F.2d 402 (CA-5), reversed on jurisdictional grounds, 370 U.S. 1; and *United States* v. *Crawford Packing Co.*, 330 F.2d 194 (CA-5).

Co. v. *Enochs* * * * and *Crawford Packing Co.* v. *United States,* * * *."

This Court felt that the resolution of the employment status of fishermen for tax purposes was a factual issue in *Enochs* v. *Williams Packing Co.*, 370 U.S. 1, 8. The government's petition for the writ in *Williams Packing Co.* argued that "The record and issues in the present case (*Williams*) poses questions of law and fact * * * which are subject to reasonable disagreement. * * *". (Vol. 32, Supreme Court Records and Briefs, October Term 1961, No. 493, Petition, p. 7, and Government Brief at pp. 23-24).

The proposed rigid and regimented doctrines for decision in employment tax cases espoused here by the petitioner were not sought by the Congress. Congress expected only a rule of reason to be applied as expressed in Sen. Rept. No. 1255, see Appendix B, at 1770, *infra*:

> "The Supreme Court prescribes lower court recognition of the Social Security Act as national legislation of national scope to be interpreted uniformly by applying the Federal rule expressed in the long-standing Treasury regulation. With this prescription, there is more assurance of uniform application of the existing regulation than could be provided by a changed regulation giving rise to new uncertainties, more varied interpretations, a larger area for litigation, greater diversity of judicial decisions".

The language of the Treasury regulation anticipated case-by-case determinations to be made in borderline cases when determining who were "employees" under the Act. At 26 CFR § 31. 3121(d)-1(c)(3):

> "Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts in each case".

The Congressional Committee considered that the common law test had a "clearly focused and practical end point" and noted that—

> "A whole field of pertinent fact * * * is available to cast its weight one way or the other. Common sense and our own experience tell us that a rule so applied will work a reasonable sifting in difficult cases." [Sen. Rept. No. 1255, see Appendix B, p. 1762, *infra*]

It is plain that Congress expected the status of "employees" for employment tax purposes in borderline cases to be resolved on a factual basis. Therefore, the petitioner's contention, that uniformity of decision in employment tax cases depends upon setting aside the judgment below (Pet. Br. p. 38), is illogical and lacks any basis in decisional law.

CONCLUSION

The judgment of the Court of Appeals below should be affirmed.

Respectfully submitted,

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August 1969

APPENDIX "A"

STATUTES AND REGULATIONS

Internal Revenue Code of 1954

Sec. 3121. DEFINITIONS

* * * *

(b) EMPLOYMENT.—For purposes of this chapter, the term "employment" means any service performed after 1936 and prior to 1955 which was employment for purposes of subchapter A of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 either (A) by an employee for the person employing him, irrespective of the citizenship or residence of either, (i) within the United States, or (ii) on or in connection with an American vessel or American aircraft under a contract of service which is entered into within the United States or during the performance of which and while the employee is employed on the vessel or aircraft it touches at a port in the United States, if the employee is employed on and in connection with such vessel or aircraft when outside the United States, or (B) outside the United States by a citizen of the United States as an employee for an American employer (as defined in subsection (h)); except that in the case of service performed after 1954, such term shall not include—* * *.

* * * *

(d) EMPLOYEE.—For purposes of this chapter, the term "employee" means—

(1) any officer of a corporation; or

(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or

(3) any individual (other than an individual who is an employee under paragraph (1) or (2)) who performs services for remuneration for any person—

(A) as an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages (other than milk), or laundry or dry-cleaning services, for his principal;

(B) as a full-time life insurance salesman;

(C) as a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(D) as a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for sideline sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations;

if the contract of service contemplates that substantially all of such services are to be performed personally by such individual; except that an individual shall not be included in the term "employee" under the provisions of this paragraph if such individual has a substantial investment in facilities used in connection with the performance of such services (other than in facilities for transportation), or if the services are in

the nature of a single transaction not part of a continuing relationship with the person for whom the services are performed.

[26 U.S.C. 1964 ed. Sec. 3121]

Sec. 3306 [As amended by § 1, Act of September 1, 1954, c.1212, 68 Stat. 1130] DEFINITIONS.

* * * *

(c) *Employment.*—For purposes of this chapter, the term "employment" means any service performed prior to 1955, which was employment for purposes of subchapter C of chapter 9 of the Internal Revenue Code of 1939 under the law applicable to the period in which such service was performed, and any service, of whatever nature, performed after 1954 by an employee for the person employing him, irrespective of the citizenship or residence of either (A) within the United States, or (B) on or in connection with an American vessel under a contract of service which is entered into within the United States or during the performance of which the vessel touches at a port in the United States, if the employee is employed on and in connection with such vessel when outside the United States, except—

* * * *

(17) service performed by an individual in (or as an officer or member of the crew of a vessel while it is engaged in) the catching, taking, harvesting, cultivating, or farming of any kind of fish, shellfish, crustacea, sponges, seaweeds, or other aquatic forms of animal and vegetable life (including service performed by any such individual as an ordinary incident to any such activity), except—

(A) service performed in connection with the catching or taking of salmon or halibut, for commercial purposes, and

(B) service performed on or in connection with a vessel of more than 10 net tons (determined in the manner provided for determining the register

tonnage of merchant vessels under the laws of the United States).

* * * *

(i) *Employee.*—For purposes of this chapter, the term "employee" includes an officer of a corporation, but such term does not include—

(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or

(2) any individual (except an officer of a corporation) who is not an employee under such common law rules.

* * * *

(26 U.S.C. 1964 ed., Sec. 3306.)

Treasury Regulations on Employment Tax (1954 Code):

§ 31.3121(d)-1 WHO ARE EMPLOYEES.

* * * *

(b) Corporate officers. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(c) *Common law employees.* (1) Every individual is an employee if under the usual common law rules the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

(2) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details

and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee under the usual common law rules. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(3) Whether the relationship of employer and employee exists under the usual common law rules will in doubtful cases be determined upon an examination of the particular facts of each case.

(d) *Special classes of employees.* (1) In addition to individuals who are employees under paragraph (b) or (c) of this section, other individuals are employees if they perform services for remuneration under certain prescribed circumstances in the following occupational groups:

(i) As an agent-driver or commission-driver engaged in distributing meat products, vegetable products, fruit products, bakery products, beverages

(other than milk), or laundry or dry-cleaning services for his principal;

(ii) As a full-time life insurance salesman;

(iii) As a home worker performing work, according to specifications furnished by the person for whom the services are performed, on materials or goods furnished by such person which are required to be returned to such person or a person designated by him; or

(iv) As a traveling or city salesman, other than as an agent-driver or commission-driver, engaged upon a full-time basis in the solicitation on behalf of, and the transmission to, his principal (except for side-line sales activities on behalf of some other person) of orders from wholesalers, retailers, contractors, or operators of hotels, restaurants, or other similar establishments for merchandise for resale or supplies for use in their business operations.

(2) In order for an individual to be an employee under this paragraph, the individual must perform services in an occupation falling within one of the enumerated groups. If the individual does not perform services in one of the designated occupational groups, he is not an employee under this paragraph. An individual who is not an employee under this paragraph may nevertheless be an employee under paragraph (b) or (c) of this section. The language used to designate the respective occupational groups relates to fields of endeavor in which particular designations are not necessarily in universal use with respect to the same service. The designations are addressed to the actual services without regard to any technical or colloquial labels which may be attached to such services. Thus, a determination whether services fall within one of the designated occupational groups depends upon the facts of the particular situation.

* * * *

§ 31.3306(i)-1 WHO ARE EMPLOYEES

(a) Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee. (The word "employer" as used in this section only, notwithstanding the provisions of § 31.3306(a)-1, includes a person who employs one or more employees.)

(b) Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee. Individuals such as physicians, lawyers, dentists, veterinarians, construction contractors, public stenographers, and auctioneers, engaged in the pursuit of an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

(c) Whether the relationship of employer and employee exists will in doubtful cases be determined

upon an examination of the particular facts of each case.

(d) If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, independent contractor, or the like.

(e) All classes or grades of employees are included within the relationship of employer and employee. Thus, superintendents, managers, and other supervisory personnel are employees. Generally, an officer of a corporation is an employee of the corporation. However, an officer of a corporation who as such does not perform any services or performs only minor services and who neither receives nor is entitled to receive, directly or indirectly, any remuneration is considered not to be an employee of the corporation. A director of a corporation in his capacity as such is not an employee of the corporation.

(f) Although an individual may be an employee under this section, his services may be of such a nature, or performed under such circumstances, as not to constitute employment (see § 31.3306(c)-2.

[26 C.F.R. § 31.3306(i)-1]

SELF-EMPLOYMENT COMPENSATION ACT (SECA)

Sec. 1401. [formerly Sec. 480, 1939 Code]—RATE OF TAX.

(a) *Old Age, Survivors and Disability Insurance* —In addition to other taxes, there shall be imposed for each taxable year, on the self-employment income of every individual, a tax as follows: (rates)

* * * *

(b) *Hospital Insurance*—In addition to the tax imposed by the preceding subsection, there shall be imposed for each taxable year, on the self-employ-

ment income of every individual, a tax as follows: (rates)

* * * *

Sec. 1402. DEFINITIONS.

(a) *Net Earnings From Self-Employment*—The term "net earnings from self-employment" means gross income derived by an individual from any trade or business carried on by such individual, less the deductions allowed by this subtitle which are attributable to such trade or business * * *.

(b) *Self-Employment Income*—The term "self-employment income" means the net earnings from self-employment derived by an individual (other than a non-resident alien individual) during any taxable year; (exceptions)

* * * *

(c) *Trade or Business*—The term "trade or business" when used with reference to self-employment income or net earnings from self-employment, shall have the same meaning as when used in section 162 (relating to trade or business expenses), except that it shall not include—(exclusions not material).

* * * *

(d) *Employee and Wages*—The term "employee" and the term "wages" shall have the same meaning as when used in chapter 21 (sec. 3101 and following, relating to the Federal Insurance Contributions Act).

* * * *

Treasury Regulations on Self-Employment Income.

Tax on Self-Employment Income.

§ 1.1401. (a) There is imposed, in addition to other taxes, a tax upon the self-employment income of every individual at the rates prescribed in section 1401(a) (old-age, survivors, and disability insurance) and (b) (hospital insurance). This tax shall

be levied, assessed and collected as part of the income tax imposed by subtitle A of the Code * * *.

(b) The rates of tax on self-employment income are as follows:

(1) For old-age, survivors, and disability insurance:

Taxable Year	Rate
Beginning before January 1, 1957	3

* * * *

(2) For hospital insurance:

Taxable Year	Rate
Beginning after December 31, 1965 and before January 1, 1967	0.35

* * * *

(c) In general, self-employment income consists of the net earnings derived by an individual * * * from a trade or business carried on by him as a sole proprietor * * * (exclusions and exceptions not material).

* * * *

Definition of Net Earnings from Self-Employment.

§ 1402(a)-1 (a) * * *.

(1) The gross income derived by an individual, less the deductions allowed by chapter 1 of the Code which are attributable to such trade or business.

* * * *

Self-Employment Income

§ 1.1402(b)-1. (a) *In general,* * * * the term "self-employment income" means the net earnings from self-employment derived by an individual during a taxable year. * * *

Trade or Business

§ 1.1402(c)-1. In order for an individual to have net earnings from self-employment, he must carry on a trade or business, either as an individual or as a member of a partnership. * * * The term "trade or business" shall have the same meaning as when used in section 162. * * *

APPENDIX "B"

[The original pagination of this Reprint is retained for convenience and ready reference]

80th Congress, Second Session

EMPLOYMENT TAXES AND SOCIAL SECURITY BENEFITS—STATUS QUO

For text of Act see p. 449

Senate Report No. 1255 (To accompany H.J.Res. 296)

House Report No. 1319, Feb. 3, 1948 (To accompany H.J.Res. 296)

The Senate Report repeats in substance the House Report.

Senate Report No. 1255

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The Senate Report repeats in substance the House Report.

Senate Report No. 1255

THE Committee on Finance, to whom was referred the bill (H.J.Res. 296) to maintain the status quo in respect of certain employment taxes and social-security benefits pending action by Congress on extended social-security coverage, having considered the same, report thereon with amendments and, as amended, recommend that the bill do pass.

WHAT THE JOINT RESOLUTION WOULD DO

1. The joint resolution would reaffirm the unbroken intent of Congress that the usual common-law rules, realistically applied, shall continue to be used to determine whether a person is an "employee" for purposes of applying the Social Security Act.

2. The resolution would maintain the status under the act of those who, prior to the enactment of the resolution, have been given coverage by erroneous construction of the term "employee" (as defined in the resolution) if social-security taxes have been paid into the old-age and survivors' insurance trust fund with respect to the covered services.

3. The resolution would assure continued benefits to those who will have attained age 65, and to the survivors of those who will have died prior to the close of the first calendar quarter which begins after the enactment of the act and who have coverage under the system because of misconstruction of the term "employee" (as defined in the resolution) even though social-security taxes have not been paid by them or in their behalf.

4. The resolution would stop extension of coverage of the act to between a half and three-quarters of a million persons who have not been, are not now, and should not be under the act, until coverage is provided by act of the Congress.

5. The resolution would stop the plan of the Treasury Department to give to these 500,000–750,000 persons free, retroactive coverage, and thus would stop a more than one-hundred-million-dollar impairment of the old-age and survivors' insurance trust fund which has been built up out of taxes collected on the wages of those who are truly "employees" and who have paid for their coverage under the system.

6. The pending resolution would not disturb the existing Treasury regulation which construes the term "employee" in the Social Security Act harmoniously with the usual common-law rules.

7. The pending resolution will maintain the moving principles of the decisions of the United States Supreme Court in the Silk, Greyvan, and Bartels cases where, in the opinion of your committee, the Court realistically applied the usual common-law rules. But if it be contended that the Supreme Court has invented new law for determining an "employee" under the social-security system in these cases, then the purpose of this resolution is to reestablish the usual common-law rules, realistically applied.

8. The resolution preserves the integrity of the trust fund by limiting payments out of the fund to persons who are "employees" under the act by the usual common-law rules, realistically applied. It leaves to Congress the opportunity to provide coverage for independent contractors and the self-employed, who are not "employees" under the act, or to those who are "employees" and are now expressly excluded from the coverage of the act.

9. The resolution would restore to the trust fund by appropriation moneys which have been paid out of the fund in the form of social-security benefits to persons not "employees" under the act and who have not contributed social-security taxes to the fund.

HISTORY LEADING TO THE JOINT RESOLUTION

The pending joint resolution arises from problems of application of the Social Security Act in the region between what is clearly employment and what is clearly independent entrepreneurial dealing.

"Employees," or their survivors, receive the benefits paid under the act; "employers" share the taxes to provide the benefits and have weighty administrative duties. Manifestly the applicable rules determining whether a relationship is that of employer and employee, or a relationship in which the parties deal independently with each other, involve important security, and tax and cost consequences for many of our citizens.

The basic assumption since the act became operative in 1936 has been that the term "employee" in the act has its common meaning; which is to say, the usual meaning under common law.

The usual common-law rule defining an "employee" is well stated in the Treasury's regulation:

> **Who are employees.**—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done.

This regulation correctly interprets the intent of Congress when it adopted the Social Security Act.

The usual meaning is inherent

The usual meaning of "employee" is natural in the scheme of the act. This is manifest in the report of the Committee on Economic Security transmitted to the Congress with the President's message of January 17, 1935, recommending social-security legislation.

This report proposed (1) a compulsory system of old-age insurance for employed workers to be supplemented by (2) a voluntary system of Government annuities for others.

Dr. J. Douglas Brown, a member of the Committee on Economic Security now serving the Committee on Finance as member of its Advisory Council on Social Security, in 1935 presented the outlines of these complementary plans to the Congress in the following words:

> • • • This is the old-age security part of the bill:
>
> • • • A Federal plan of compulsory contributory old-age insurance to provide a means whereby employed workers with the help of their employers may insure themselves against dependent old age, and lift themselves through thrift up from the level of dependency on public or private charity in old age. • • • [This] plan is contributory and contractual and affords an annuity as a matter of right. It applies to all employed persons receiving less than $250 a month • • •.
>
> A Federal plan of voluntary old-age annuities to provide self-employed persons such as shopkeepers and farmers a means whereby they may make secure and economical provision for old age.
>
> The • • • [two] plans complement each other, one covering employed persons, the other self-employed. (Economic Security Act, Hearings, House of Representatives, 1935, p. 240.)

The Congress did not adopt the voluntary plan, but did enact the compulsory plan substantially as recommended. Under a title providing definitions the act [Section 1101(a) (6)] says, simply, that:

The term "employee" includes an officer of a corporation.

It was not necessary to go beyond this simple statement to express the intent that the usual meaning of "employee" should prevail except that the term should be taken to mean also "an officer of a corporation."

The usual meaning was accepted in the administrative regulations

At the time the act was adopted there was no doubt or dispute or question that "employee" in the act had its usual common-law meaning. The Federal Security Agency (then the Social Security Board) and the Treasury Department proceeded promptly after enactment of the act to issue their interpretative regulations and these, identical in their provisions, were substantially the same as the now-existing regulations:

REGULATION 91,[1] ARTICLE 3: WHO ARE EMPLOYEES

Who are employees.—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so.

The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services.

In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.

Considering this regulation years later a learned judge said:

We accept Article 3 of Regulations 91 as an authoritative definition of the distinction between an "employee" and an "independent contractor"—

[1] Presently numbered Regulations 106.102.204.

it is really no more than a gloss upon the definition contained in Justice Gray's opinion in Singer Manufacturing Co. v. Rahn (132 U.S. 518, 523) * * *. The test lies in the degree to which the principal may intervene to control the details of the agent's performance; and that in the end is all that can be said, though the regulation redundantly elaborates it. * * * —Judge Learned Hand in Radio City Music Hall Corp. v. U. S. (135 F.(2d), 715 (1943)).

The Congress rejected as "unwise" proposals to enlarge the ordinary meaning of employee

The intention of the Congress that "employee" in the Social Security Act should have its usual meaning under common-law rules, realistically construed, was reaffirmed when the Congress made fundamental revisions of the act in 1939 to establish the present system of old-age and survivors' insurance. The Congress at this time considered the definition of "employee" in the act and rejected a Social Security Board proposal to enlarge it so as to encroach into the field of independent contractors and the self-employed. The proposal was to broaden the definition of "employee" to:

*** * * cover more of the persons who furnish primarily personal services. The intention of such an amendment would be to cover persons who are for all practical purposes employees *but whose present legal status may not be that of an employee.* [Emphasis supplied.] At present, for example, insurance, real estate and traveling salesmen are sometimes covered and sometimes not. The Board believes that all such individuals should be covered. (Hearings, Committee on Ways and Means, House of Representatives, 1939, p. 8.)**

In answer to questions submitted in writing to the Board the Board's proposal was further defined, and limited, as follows:

Question. Do you mean by the inclusion of salesmen the inclusion of those people who are now classified as independent contractors?

Answer. The intention of this proposal is to clarify the employee relationship of certain persons who are now on the border line of coverage. There is no intention to include all so-called independent contractors (id., p. 2300).

After hearings the Committee on Ways and Means of the House of Representatives reported a bill including an amended definition of "employee" to accomplish the proposal. In its report the Committee on Ways and Means said of the proposed amendment:

***The tests for determining the (employer-employee) relationship laid down in cases relating to tort liability and other common-law concepts of master and servant should not be narrowly applied.* In certain cases even the most liberal view as to the existence of the employer-employee relationship will fall short of covering individuals who should be covered. For example, certain classes of salesmen. In the case of salesmen it is thought desirable to extend coverage *even where all the usual elements of the employer-employee relationship are wholly lacking* and where accordingly even under a liberal application of the law *the courts would not ordinarily find the existence of the master and servant relationship.* It is the intention of this amendment to set up specific standards so that individuals performing services as salesmen may be uniformly covered *without the necessity of applying any of the usual tests as to the relationship of employer and employee* (Rept. 728, 76th Cong., 1st Sess., p. 61). [Emphasis supplied.]**

The Committee on Finance, in hearings on the House-passed, amended bill, heard testimony by proponents and opponents of the amended defi-

nitions of "employee" and "employer," considering this testimony in the light of the common-law definitions of "employee" and "independent contractor" as stated in the Treasury Regulations, and deliberated on whether the term "employee" in the Social Security Act should have its meaning according to the usual principles of the common law or should be given a special statutory definition. In reporting its conclusion to the Senate the committee said:

> The House proposal to extend coverage to salesmen who are not employees has been stricken out by the Committee. It is believed inexpedient to change the existing law which limits coverage to employees * * * (Senate Report 734, 76th Cong., 1st sess., p. 75).

The committee action was explained on the floor of the Senate:

> MR. HARRISON. There is a proposal in the House bill for the extension of coverage to salesmen. Under the present law, whether a salesman is covered depends upon the test of whether he is an employee in the legal sense, and your committee believes that it would be unwise at this time to attempt any change * * *.

The Senate adopted the recommendations of the committee, the bill went to conference and the action of the Senate was upheld (Conference report, Rept. 1461, 76th Cong., 1st sess., p. 14).

By enactment of the bill the Congress adopted the rules for distinguishing "employee" and "independent contractor" set out in the Treasury Regulation.[2]

The pending resolution (H.J.Res. 296) merely affirms the existing definition of "employee" in the act and the legislative action taken in 1939 with special reference to this definition.

Lack of uniformity of Federal court decisions applying the term "employee"

In the intervening years prior to the decisions of the United States Supreme Court in 1947, a lack of uniformity developed in Federal district and circuit court decisions construing the term "employee" in the Social Security Act.

The general tendency among the lower Federal courts, when presented with the problem of determining the existence of an employer-employee relationship, was to adopt the precedents of local law. These varying among the different States, considerable conflict in lower court decisions followed even though the factual situations presented for determination were not unlike.

Moreover when the cases presented were on a claim for benefits, the courts tended to a liberal construction of the term "employee." On the other hand, when the cases were on an assessment of taxes, particularly where penalties were involved, the courts tended to construe the term "employee" more strictly.

In consequence the application of the Social Security Act has not been uniform throughout the Nation.

2 "Treasury regulations and interpretations long continued without substantial change, applying to unamended or substantially re-enacted statutes are deemed to have received congressional approval and have the effect of law" [Helvering v. Winmill (59 S.Ct. 45)]. The existing regulations were specifically held to have been approved by Congress and therefore to be in conformity with the law in Jones v. Goodson (121 F.2d 176; C.C.A.10, 1941).

Conflict of viewpoints and actions of the administrative agencies

The courts have not been aided by the administrative agencies, for here too there has been serious conflict of viewpoints and actions respecting application of the act. The Federal Security Agency, which has the responsibility for administering the benefits provided by the act, has strained the meaning of "employee" to place persons on the benefit rolls and—as was revealed to your committee during its consideration of the pending resolution, and as appears certain—has "gone too far in some cases." [3]

The Treasury Department, charged with the responsibility for collecting the taxes imposed on employees and employers under the act, has proceeded with more careful view of the authority conferred by the statute—at least until recently.

Dissipation of the old-age and survivors' insurance trust fund

The discordant meanings assigned to "employee" by the two administrative agencies charged with applying the tax and benefit provisions of the Social Security Act have resulted in uncompensated withdrawals from the trust fund which has been built up from the contributions of persons who have paid social-security taxes and to which the 33,000,000 persons now insured under the act look for payment of their benefits.

This aspect of the present problem is discussed more fully further on. The pending resolution would restore the losses sustained by the fund and preserve it from further dissipation and loss.

Decisions of the Supreme Court

The conflict of decisions by Federal district and circuit courts did not manifest itself markedly until 1945. To resolve the conflict the Supreme Court assumed jurisdiction of three cases involving the coverage of the Social Security Act, handing down its decisions in these cases in June 1947. The cases are:

United States v. Silk (331 U.S. 704)
Harrison v. Greyvan Lines, Inc. (331 U.S. 704)
Bartels v. Birmingham (332 U.S. 126)

These cases are discussed at length in a following section of this report.

In the view of your committee these decisions affirm that the usual common-law rules, realistically applied, must be used to determine whether a person is an "employee" for purposes of applying the Social Security Act. And properly interpreted they should resolve the conflict of lower court decisions and encourage nation-wide uniformity of application of the act.

But, we repeat, if it be argued that the Supreme Court decisions establish a new definition of "employee," then it is the purpose of this resolution to reestablish its meaning according to the usual common-law rules, realistically applied.

The proposed Treasury Department regulation

In November 1947 the Treasury Department proposed, and unless stopped by the Congress will make effective, a new regulation construing

[3] In the words of the testimony of the Federal Security Administrator (Hearings, Finance Committee p. 137).

the term "employee," with which it would supersede the regulation that has been in force during the period the act has been effective.

An analysis of this regulation is presented in the following pages. In a word, by unbounded and shifting criteria, it would confer in those administering the Social Security Act full discretion to include, or to exclude, from the coverage of the act any person whom they might decide to be, or might decide not to be, an "employee"; and like discretion to fasten tax liabilities and the administrative duties and costs of compliance with the act upon any person whom they might decide to be an "employer."

Moreover, at the cost of the many millions of workers who with their employers have faithfully paid for their status under the social-security system, and have the right to believe the trust fund established by the act will not be impaired or dissipated, this proposed regulation would grant retroactive, free coverage for a period of four years or more to, by the explicit statement of officials testifying to your committee, from five hundred to seven hundred and fifty thousand persons.

Need for the pending joint resolution

The situation thus outlined obviously calls for a reassertion of congressional intent regarding the application of the act, and for steps to preserve the integrity of the old-age and survivors' insurance trust fund. Both are provided in the pending joint resolution.

THE ISSUE

The issue presented by the proposed regulation is not whether the coverage of the Social Security Act ought to be extended. That is for Congress to decide.

The issue presented is whether, contrary to the intent of Congress manifested by the act and its legislative history and, in the opinion of your committee, contrary to the Supreme Court's recent decisions construing the meaning of "employee" in the act, the Treasury Department shall be allowed to make its own law as to the meaning of "employee" so as to bring within the scope of the act, by administrative regulation, persons not now covered; and whether the Federal Security Agency shall be permitted to dissipate the old-age and survivor's insurance trust fund through benefit payments to persons, not "employees" under the act, who have not, therefore, made contributions to the trust fund.

OUTLINE OF THE ARGUMENT

The following sections of this report discuss the proposed Treasury Department regulation; the Supreme Court decisions upon which the regulation, allegedly, is based; the answer afforded by the Supreme Court decisions to the arguments advanced by the Federal Security Agency in opposition of the pending resolution; the encroachment represented by the proposed Treasury regulation upon the exclusive power of Congress to extend the coverage of the act; the intended impairment of the old-age and survivors' insurance trust fund by the proposed Treasury regulation; and the situation presented by previous dissipations of the fund.

The falsity of the charges that the resolution would "retract" the coverage of the act from any entitled to its coverage and benefits will be

demonstrated in the course of these sections, and on the basis of the record of the testimony given at the hearings.

While the references throughout this report are to the proposed Treasury regulation, it ought to be noted, and emphasized, that the Treasury regulation is the joint product of the Federal Security Agency and the Treasury Department. As your committee was informed by the Federal Security Administrator in his prepared statement at the hearings:

When the Supreme Court decisions came down we quickly agreed with the Treasury Department that the existing regulations no longer adequately indicated to taxpayers and prospective beneficiaries the rules of the game. While the Court did not expressly hold the regulations invalid, they had plainly ceased to serve the function which interpretative regulations are designed to serve. Amendment seemed to all of us imperative.

The Treasury and the Federal Security Agency set up a joint drafting committee, with specific instructions to devise a regulation which would incorporate and express the results of the Court decisions. What they came up with, with only minor modifications, is the proposed Treasury decision published in the Federal Register last November (hearings, Finance Committee, p. 159).

THE PROPOSED TREASURY REGULATION

Pursuant to the Administrative Procedure Act, the Secretary of the Treasury caused to be published in the Federal Register for Thursday, November 27, 1947, a proposed regulation to be effective on January 1, 1948, redefining the employer-employee relationship for the purpose of applying social-security taxes.

Introduction of the pending joint resolution in the House and Senate followed publication of this proposed Treasury Department regulation, but only after the Department had indicated it would persist in its intentions to promulgate the regulation notwithstanding protests that followed the announcement of it.[4]

Based on unsubstantiated, guesswork estimates by the Federal Security Agency, reports were widely circulated and Members of Congress were proselyted to persuade them to believe that the pending joint resolution would "take away the social-security coverage of some half to three-quarters of a million people."

On the contrary, the fact is that the pending resolution would stay the promulgation of a proposed Treasury law-making regulation which would broaden the term "employee" to bring this additional number of persons within the scope of the act and thus dilute its protection to those who are entitled to it.

The impression was cultivated that the resolution would snatch matured benefits from this large number of persons whereas the fact is that of this number only a small fraction is now receiving social-security benefits, and their benefits are not disturbed by the pending resolution in anywise, but on the contrary are by it given authority in law.

• • • The persons who have actually retired after having reached age 65 and are drawing benefits in accordance with the interpretation we have placed upon the Social Security Act • • • is not 500,000, but the persons who are entitled to wage credits • • • as the Administrator just mentioned, we estimate amount to between 500,000 and 750,000 per-

[4] Notice of proposed rule making, Federal Register, Nov. 27, 1947, p. 7966. H. J. Res. 296 introduced Jan. 15, 1948; S. J. Res. 180 introduced Jan. 30, 1948.

sons.—Testimony of Mr. Arthur J. Altmeyer, Commissioner for Social Security, hearings, Finance Committee, April 1 and 2, 1948, page 126.

• • • That is an estimate based upon the total number of people estimated to be in this area which it is believed are not now covered.—Testimony of Mr. Adrian W. DeWind, tax legislative counsel, Treasury Department (id., p. 7).

The CHAIRMAN. • • • As to those that are on the benefit rolls, who are now eligible for benefits when they have met all of the benefit conditions, is that a large part of the four, five, six, or seven hundred thousand people, or is it a small part of them?

WITNESS. I could not even hazard a guess. My guess would be that, of the wage records that are now existing for this group of people within our agency, it is a very, very, small percentage of them.

The CHAIRMAN. So the bulk of them will come on if this regulation becomes effective?

WITNESS. That is true.—Testimony of Mr. Robert C. Ayers, Bureau of Old-Age and Survivors Insurance, Federal Security Agency (Finance Committee hearings, p. 202).

Typical of the persons which the proposed regulation would bring within the coverage of the act, in the light of the testimony at hearings before your committee, are persons who buy goods and sell them from door to door retaining for themselves the excess they secure for the goods over their cost; solicitors who take orders retaining for their services the deposits they collect when they write the order; manufacturers' representatives, commission agents, and insurance salesmen who represent several companies, are compensated by commissions, and are substantially free from direction or control over how they discharge their sales activities; advertising and newspaper and magazine subscription solicitors; artists, entertainers, and writers; mine lessees; timber cutters; lessees of sawmills; bulk oil distributors and contract filling-station operators; many subcontractors in the construction field; journeyman tailors; home workers; taxicab operators; truckers and others who occupy themselves, full time or part time, in a variety of activities which are sometimes those of an employee and sometimes are not.

Frequently these services are performed where supervision of performance is impracticable, if not impossible, and the persons who engage in these activities are largely or wholly free from direction as to how they pursue them, and, in the frequent case, as to when or whether they pursue them.

When these services are performed without any direction or right of direction over the persons who perform them, and the persons who perform them are not in the least accountable for what they do as contrasted with the much tighter accountability of wage earners and salaried workers, then under the existing Treasury regulation, and quite properly so, such persons are recognized as "independent contractors," or self-employed in a class with "independent contractors."

By the criteria of the common-law rule they are classified as such. We repeat, the usual common-law rule is well stated in the existing Treasury Regulations:

Who are employees.—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who per-

forms the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done.

Thus the inquiry when proceeding under the usual common-law rule, realistically applied, has a clearly focused and practical end point. The whole field of pertinent fact, documentary and otherwise is available to cast its weight one way or the other. Common sense and our own experiences tell us that the rule so applied will work a sensible sifting of difficult cases.

The concept of "economic reality" basic to proposed regulation

The proposed regulation discards the common-law rules for distinguishing the employer-employee relationship distilled from many decisions by many courts out of many insights of real situations, for a new rule of nebulous character.

Under the proposed regulation an "employee" is "an individual in a service relationship who is dependent as a matter of economic reality upon the business to which he renders service and not upon his own business as an independent contractor."

The rule, obviously, will not serve to make the necessary distinctions. Who, in this whole world engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person? The corner grocer, clearly not an employee, is economically dependent upon his customers, his banker, his supplier. No, the economic reality test must be given sharper meanings. It has an appropriate place in the business before us and we shall come to it after reviewing what the Treasury would make of its new and completely amorphous panacea.

The Treasury in its proposed regulation provides for determining whether the employer-employee relationship exists the following factors:

1. **Integration of the individual's work in the business to which he renders service.**
2. **Investment by the individual in facilities for work.**
3. **Opportunities of the individual for profit and loss.**
4. **Permanency of relation.**
5. **Skill required of the individual.**
6. **Degree of control over the individual.**[6]

Uncertainty of the proposed new regulation

The proposed regulation specifies that the listing of the factors for determining the existence of an employer-employee relationship is "neither complete nor in order of importance."

Further it provides:

Just as the above listed factors cannot be taken as all-inclusive so too the statement of facts or elements set forth in (an amplifying) paragraph * * * cannot be considered complete. *The absence of mention of any factor, fact, or element in these regulations * * * should be given no significance.* [Emphasis supplied.]

[6] **The criteria are listed above in the approximate order of emphasis they received at the hearings before the committee in lieu of their order of statement in the published regulation.**

And further:

> No one factor is controlling. The mere number of factors pointing to a particular conclusion does not determine the result. All the factors are to be weighted for their composite effect. It is the total situation in the case that governs in the determination.
>
> One fact or element may establish or tend to establish the existence of more than one factor, and may even have an independent value of its own • • •. The weight to be given [the] factor in a particular case depends upon all the facts of that case • • •.

Thus, while purporting to specify criteria by which rights and liabilities under the act can be ascertained, the proposed regulation concerns itself mainly, as was stated to your committee by a witness at the hearings:

> • • • with making it abundantly clear that on virtually no state of facts may anyone be certain whether or not he has a tax liability until the Commissioner has made up his mind about it. The regulation states many criteria which the Commissioner may take into account but then specifically says the list is not complete, that none of the criteria are controlling, that the weight to be given any factor will vary from case to case depending upon the particular facts of each case; that even if all stated factors point to one conclusion, others not set forth, or even hinted at, may result in an exactly opposite conclusion. (Robert E. Canfield, Finance Committee Hearings, p. 166.)

Of course, all of the first five of the factors supra which are numbered and specified, and any others which are pertinent to the end-point determination of whether there is common-law control, may and should be used.

But the fatal error of the Treasury's proposed regulation is that this end-point determination of the existence or absence of control under the usual common-law rule as required by the act, as is correctly interpreted by existing regulations and by the legislative history of the act, has been subordinated and diluted and reduced to possibly inconsequential effect by making it into only one (No. 6) of the specified, numbered but completely unweighted factors, and into only one of an unlimited number of unspecified and unweighted factors which may be invented by the administrators to satisfy the exigencies of their future decisions.

The reservation of unbridled powers

The classes of persons who purportedly are entitled to the coverage of the act are not delimited so an individual within the class may know his rights and claim them. The persons upon whom the proposed regulation would impose the duties and liabilities of the act—among the latter liabilities for taxes, and civil and criminal penalties that may involve imprisonment for felony—are provided no stated rule by which to determine their obligations, and must guess themselves to be subject to the uncertain language of the regulation or be at their peril. Whether persons have the rights and obligations of coverage is made by the regulation to depend entirely upon administrative findings and determinations.

While the regulation claims benevolent objectives, its character is despotic. It reposes in the administrator unfettered discretion to apply, or to take away, the coverage of the act.

The existing regulation as contrasted with the proposed regulation is not devoid of uncertainty, but its basis is in established standards of law which frame and limit its application. These standards are both restraints

upon the subjects of the act and upon its administrators. There is nothing in the act that authorizes administrators or courts to extend its terms. Indeed, obvious jurisdictional limitations, and the protection of those who are clearly entitled to its benefits, negatives contrary assertion or practice.

The basic principle of the proposed regulation—economic reality—as has been pointed out, is a dimensionless and amorphous abstraction. Until precedents are established by administrative rulings applying the new principle in concrete cases, and the courts shall have surrounded the idea with empirical bounds, the meaning of the regulation would continue equivocal, and its application would be vagrant and capricious.

The Treasury and the Federal Security Agency admit the uninformative nature of the regulation but urge that a body of precedent will be quickly built up by administrative rulings, and a more uniform application of the act will ensue than has been possible under the existing regulation as variously interpreted by the courts.

*** * * Now I am the first to admit that these proposed regulations are not as informative as we could wish in terms of telling the public who is in the system and who is out * * *.**

In the course of its work on the proposed regulations the joint committee discussed a great many cases * * * to their surprise * * * found in nearly all cases they quickly reached a unanimity of opinion * * *.

Let me hazard this prophecy: That if these new regulations are allowed to become effective, administrative rulings under them will quickly build a body of precedent that will be more informative to the public than the rules we have tried to operate under in the past * * *.—Testimony of the Federal Security Administrator (hearings, Finance Committee, pages 159–160).

Thus there is unreserved administrative claim for functions that are, inherently, legislative and judicial.

The argument for these powers

The claim to the broad powers conferred by the proposed regulation is argued by the Federal Security Agency on grounds of the need for a liberal construction of the term "employee," and one that will apply uniformly throughout the country; as well as by asserted reasons of administrative convenience. According to the Treasury, the proposed regulations and the abandonment of the existing regulations are compelled by intervening decisions of the United States Supreme Court.

THE SUPREME COURT DECISIONS

In June 1947 the Supreme Court considered the applicable standards for the determination of employees under the Social Security Act in U. S. v. Silk and Harrison v. Greyvan Lines, Inc. (331 U.S. 704); and in Bartels v. Birmingham (332 U.S. 126).

The Silk and Greyvan cases were considered together, and are the leading decisions.[6]

[6] It does not appear whether the Court in arriving at its opinions in these cases considered the definition of "employee" in the act. In its opinions the Court refers to the definitions of "employment" and "wages" cited in the Government's brief as among the pertinent statutory provisions to be considered, but the Government's brief did not cite the definition of "employee" and the Court's opinion omits all mention of that definition. It is therefore a matter of speculation whether the Court took particular notice of the definition of "employee" that is amended by the pending joint resolution, and what the effects on its decision might have been if it did not, and had taken, note of the definition.

Prefacing its decisions in Silk and Greyvan with the statement that application of social-security legislation—

should follow the same rule that we applied to the National Labor Relations Act in the Hearst case (Board v. Hearst Publications (322 U.S. 111))[7]—

the Court observed that—

as Federal social-security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose[8]—

and that—

when the problem (of differentiating between employer and independent contractor) arose in the administration of the National Labor Relations Act * * * we rejected the test of the "technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants" * * *.[9]

and recalled:

We concluded that, since the end was the elimination of labor disputes and industrial strife, "employees" included workers who were such as a matter of economic reality.[9]

In these prefatory observations of the Court in Silk and Greyvan, and in the Hearst case primarily,[10] the Treasury Department finds the basic principle of its proposed regulation:

An employee is an individual in a service relationship who is dependent, as a matter of economic reality, upon the business to which he renders service * * *—

enlarging this vastly by the addition of—

* * * and not upon his own business as an independent contractor.

The Treasury seizes upon these prefatory remarks of the Court to promulgate its test of economic reality. It argues that the test is substantive and will determine the employer-employee relationship; that it replaces the common-law tests; that it is law pronounced by the Supreme Court. The Treasury contends that its proposed regulation is compelled by the decisions of the Court, and that the regulation does no more than implement the Court's decisions.

By the same arguments, in its report to your committee, it opposes the pending resolution which would represent additional legislative approval of the existing Treasury regulation. Its report says:

7 United States v. Silk (331 U.S. 704, 713–714.)
8 United States v. Silk (331 U.S. 704, 712).
9 United States v. Silk (331 U.S. 704, 713).
10 The Treasury also relies on Rutherford Food Corporation et al. v. McComb (331 U.S. 722), a Fair Labor Standards Act case. The Treasury looks to that part of the opinion which refers to language of the circuit court to the effect that the test for determining who is an employee is not the common-law test of control. The Supreme Court did not accept this viewpoint as a part of its own philosophy. It proceeded to make its own analysis of the facts surrounding the work of the alleged independent contractors and, looking beyond the form of the arrangement to its real substance, concluded that "independent contractor" was a mere label and the worker who had it, together with the others who worked with him, were really employees. The Supreme Court pointed out that the individuals involved worked alongside of admitted employees, that they did their work as an integral part of the production line of the business, did all their work in that one plant, were subject to the frequent supervision of the manager of the plant, and that under the circumstances of the case the money they received was equivalent to piecework wages. The moving part of the case is consistent with the realistic application of the common-law control rule.

In the first place, the proposed resolution would not maintain the status quo but would change the law as pronounced by the Supreme Court in June 1947 * * *. It would substitute the common-law rules for the principles of economic reality recently set forth by the Supreme Court as governing the determination of the employer-employee relationship for purposes of the social-security program * * *.

As we have seen, the Treasury borrows this language of the Court in its prefatory remarks in Silk and Greyvan to comfort its arguments in support of the proposed regulation. It relies also on the dictum in Bartels where it is said:

In United States v. Silk we held * * * control is characteristically associated with the employer-employee relationship, but in the application of social-legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service * * *.[11]

However the argument that the Supreme Court, in the Silk and Greyvan cases, established new substantive law for determining an employer-employee relationship cannot be accepted. It is self-destructive, for Congress continues to have the exclusive power to make law.

Moreover from what the Court proceeds to say after stating that—

application of social-security legislation should follow the same rule that we applied in the Hearst case[12]—

it appears that it was enunciating the principle that narrow and doctrinaire applications of technical concepts of tort liability do not comport with the purposes of legislation of a remedial character, and that no superseding "rule" of economic reality was intended. For by way of modification and limitation the Court proceeded immediately to say:

This, of course, does not leave courts free to determine the employer-employee relationship without regard to the provisions of the act. The taxpayer must be an "employer" and the man who receives wages an "employee." There is no indication that Congress intended to change normal business relationships * * *. Few businesses are so completely integrated that they can themselves produce the raw material, manufacture and distribute the finished product to the ultimate consumer without assistance from independent contractors. *The Social Security Act was drawn with this industrial situation as a part of the surroundings in which it was to be enforced. Where a part of an industrial process is in the hands of independent contractors, they are the ones who should pay the social-security taxes.*[13] [Emphasis supplied.]

The decisions of the Court in Silk and Greyvan and Bartels and the tests, the moving principles by which the Supreme Court reached those decisions, were the usual common-law tests and principles realistically applied. Let us demonstrate this.

In the Silk and Greyvan cases the Commissioner of Internal Revenue had proceeded under the existing Treasury regulation in the assessment of social-security taxes, and the cases were brought for recovery. The lower courts held for the taxpayers and against the Commissioner.

The Silk case involved: (1) Unloaders of coal who made themselves available in coal yards at a waiting shed, some of them floaters who came only intermittently. As carloads of coal were delivered by the railroad the unloaders unloaded them into assigned bins at an agreed

11 Bartels v. Birmingham (332 U.S. 126, 130).
12 United States v. Silk (331 U.S. 704, 713).
13 United States v. Silk (331 U.S. 704, 714).

price per ton. Also (2) truckers who owned their own trucks, paid their own operating expenses, were free to work for others, and delivered coal for Silk at a uniform price per ton.

The Greyvan case involved a formal contract between Greyvan Lines, Inc., a common carrier licensed under the Motor Carrier Act, and local operators who performed the actual service of carrying the goods. The operators were required to haul exclusively for the company, furnish their own trucks, paint the designation "Greyvan Lines" on them, hire their own truckmen, pay all expenses, provide insurance, indemnify the company for losses, and to operate subject to the control of Greyvan dispatchers and under a manual of instructions which regulated in detail the conduct of the truckmen in the performance of their duties.

In the Silk case, where the employment arrangements were informal, the moving ground for the lower court's decision was:

> **The undisputed facts failed to establish such reasonable measure of direction and control over the method and means of performing the services performed by these workers (the unloaders and truckers) as is necessary to establish a legal relationship of employer and employee between the appellee and the workers in question.[14]**

In Greyvan, where a formal contract of employment was involved, the moving ground of the decision of the lower court was:

> **The company cannot be held liable for employment taxes on the wages of persons over whom it exerts no control and of whose employment it has no knowledge. * * * While many factors in this case indicated such control as to give rise to [the employer-employee] relationship we think the most vital one is missing because of the complete control of the truckmen as to how many, if any, and what helpers they make use of in their operations.[15]**

Thus, in both the Silk and Greyvan cases, the lower courts reached their decisions by applying the common-law test of direction and control.

The Supreme Court took jurisdiction because of conflicting decisions in the lower courts:

> **Writs of certiorari were granted * * * because of the general importance * * * of deciding what are the applicable standards for the determination of employees under the act. Varying standards have been applied by the Federal Courts.[16]**

The cases were considered together. The Court decided them on the basis of the existing Treasury regulation which is framed to secure realistic application of the usual common-law rules as intended by the Social Security Act.

> *** * * The long-standing regulations of the Treasury and Federal Security Agency * * * recognize that independent contractors exist under the Act. * * * The Government points out that the regulations were construed by the Commissioner of Internal Revenue to cover the circumstances here presented.[17]**

As to the truckers in Silk and Greyvan:

> **So far as the regulations refer to the effect of contracts we think their statement of the law cannot be challenged successfully. Contracts, how-**

[14] United States v. Silk (155 F.2d 356, 359).
[15] Greyvan Lines v. Harrison (156 F.2d 412, 415–416).
[16] United States v. Silk (331 U.S. 704, 705).
[17] United States v. Silk (331 U.S. 704, 714–715).

ever, "skillfully devised," • • • should not be permitted to shift tax liability as definitely fixed by the statutes • • •.[18]

But we agree with the decisions below • • • that where the arrangements leave the driver-owners so much responsibility for investment and management as here, they must be held to be independent contractors. These driver-owners are small-business men. They own their own trucks. They hire their own helpers. In one instance they haul for a single business, in the other for any customer. The distinction, though important, is not controlling. It is the total situation, including the risk undertaken, the control exercised, the opportunity for profit from sound management, that marks these driver-owners as independent contractors.[19]

And as to the unloaders in Silk:

Giving full consideration to the concurrence of the two lower courts in a contrary result, we cannot agree that the unloaders in the Silk case were independent contractors. They provided only picks and shovels. They had no opportunity to gain or lose except from the work of their hands and these simple tools. That the unloaders did not work regularly is not significant. They did work in the course of the employer's trade or business. This brings them under the coverage of the act. They are of the group that the Social Security Act was intended to aid. *Silk was in a position to exercise all necessary supervision over their simple tasks.* Unloaders have often been held to be employees in tort cases • • •. [Emphasis supplied.][20]

The Court thus applied the existing regulation in deciding the truckers were independent contractors and sustained the finding of the Commissioner of Internal Revenue that the unloaders were employees in the sense of the term as set forth in the Treasury regulation.

We repeat that the existing regulations were framed to secure realistic application of the usual common-law rules as intended by Congress. We emphasize that those regulations have existed since the act became operative. They have survived several legislative revisions of the act. Therefore may be considered as valid expressions of congressional intent.

Since the Commissioner proceeded, and the Court proceeded, by applying the existing regulation, the decisions of the Court do not compel change of the regulation. Furthermore, the Court did not find that extension of the existing regulation was necessary to arrive at the conclusions it reached, and so enlargement of the regulation is not required.

On the contrary in three of the four situations presented for decision the Supreme Court held that the Treasury Department had proceeded without realistic regard for the industrial surroundings within which the act was drawn and in the light of which it was to be enforced. In two of the three situations it constricted the Treasury's application of its own existing regulation by holding that the parties involved were independent contractors rather than employees as claimed by the Treasury; and in the fourth it held that the Commissioner had exceeded his statutory authority in recognizing a contract which purported to make an "employer" of one who was not the employer in fact.

Rather than giving the Government a broader license, the decisions of the Supreme Court in Silk and Greyvan and Bartels were that the Government had overextended the powers it had under the existing Treasury regulation. Now, contrarily, and despite this rebuff, the Treasury Depart-

[18] United States v. Silk (331 U.S. 704, 715).
[19] United States v. Silk (331 U.S. 704, 719).
[20] United States v. Silk (331 U.S. 704, 716–718).

ment brings forward a proposed regulation that would give the Department authority to make the very type of interpretations rejected by the Supreme Court. Rather than implementing the Supreme Court decisions, the proposed Treasury regulation attempts to surmount, supersede, and negative them.[21]

The doctrine of the Supreme Court in Silk, Greyvan, and Bartels, as reflected by its disposition of the specific situations presented in those cases, is an applied expression of the following statement of congressional intent in the legislative history:

The tests for determining the (employer-employee) relationship laid down in cases relating to tort liability, and other common-law concepts of master and servant, should not be narrowly applied (H.Rept. No. 728, 76th Cong., 1st sess., p. 61).

Our interpretations of these decisions is strongly fortified by the fact they are brought into accord with the act, the legislative history of the act, and with the administrative regulations which have acquired force of law. Those who challenge this, and oppose with conflicting interpretations, have the unhappy burden of demonstrating that the Supreme Court has the right to make its own law in the field.

A sound reading of these cases requires that the prefatory and random remarks of the Court which have been seized upon to supply a spurious gloss of validity to the proposed Treasury regulation shall be harmoniously related to the facts involved, the decisions, and to their moving rules; and if this cannot be done they must be regarded as surplusage.

If we were compelled to interpret these remarks of the Court we would say, in untechnical and summary fashion and without aiming at complete exposition, that the lower courts and administrative agencies were told: Don't be fooled or unduly influenced by the form of the arrangement to which you must apply the Social Security Act. Look to the real substance. Illuminate the usual common-law control tests by regard for all the pertinent facts. This requires that all of the realities that will lead you to the truth must be consulted and weighed along with all other significant indicators of the real substance of the arrangement.

But this again should be said: If we have misinterpreted these decisions of the Supreme Court, if we have incorrectly called the real moving principles of these cases, if the Treasury's interpretations and the proposed regulation based upon them are correct, then by this resolution we propose to restore the usual common-law rules, realistically applied.

UNIFORMITY OF APPLICATION OF THE ACT PROMOTED BY SUPREME COURT DECISIONS APPLYING THE EXISTING REGULATION

The moving principles of the decisions of the Supreme Court in Silk, Greyvan, and Bartels, if we have interpreted them correctly, likewise pro-

21 The rule of the Hearst case has been repudiated by the Congress. "• • • Although independent contractors can in no sense be considered to be employees, the Supreme Court in NLRB v. Hearst Publications (322 U.S. 111) • • • refused to consider the question whether certain categories of persons whom the Board had deemed to be 'employees' were not in fact and in law really independent contractors. The House bill contained a clarifying provision to the effect that no individual was to be considered an employee for the purposes of the act unless he was employed by an employer as defined by the act • • •" (and) excluded from the definition of 'employee' any person having the status of independent contractor (conference report, H. R. 5020, H. Rept. No. 510, 80th Cong., 1st sess.). The conference report followed the House bill (cf. p. 33). Therefore, the Treasury Department proposes simultaneously to override the Congress' intent.

vide answer to the arguments of the Federal Security Agency for a rule of common application promotive of more uniform coverage of the act than the varying standards reflected in past decisions of Federal district and circuit courts.

The Supreme Court prescribes lower court recognition of the Social Security Act as national legislation of national scope to be interpreted uniformly by applying the Federal rule expressed in the long-standing Treasury regulation. With this prescription, there is more assurance of uniform application of the act by continued application of the existing regulation than could be provided by a changed regulation giving rise to new uncertainties, more varied interpretations, a larger area for litigation, greater diversity of judicial decisions.

IRRELEVANCY OF MAJOR ARGUMENT OF FEDERAL SECURITY AGENCY IN OPPOSITION TO THE RESOLUTION

The major argument asserted by the Federal Security Agency against the pending joint resolution is that the resolution intends to reenact the past restrictive decisions of the lower Federal courts. In the words of the Federal Security Administrator:

What disturbs me the most about House Joint Resolution 296 is this line of decisions * * *. As nearly as we can judge * * * it seems to be the intention of the sponsors of the resolution to reenact the restrictive court decisions I have referred to * * *.

This argument is based upon false premises. As stated in the report of the Committee on Ways and Means of the House:

The purpose * * * is to apply the rule of the existing regulations that an independent contractor under the usual common-law rules is not an employee.

In determining whether an individual is an independent contractor, the existing regulations apply the usual common-law test of control, irrespective of the law of the particular State. It is the purpose of the regulation to reaffirm this rule * * * (Rept. No. 1319, 80th Cong., 1st sess., p. 5).

INTERFERENCE WITH LEGISLATION BY THE CONGRESS TO EXTEND THE COVERAGE OF THE ACT

The extension of the coverage of the Social Security Act is a matter of great interest in the Congress.

Pursuant to Senate resolution the Senate Finance Committee has established a distinguished Council to survey the act and recommend improvement. The Council is busily at work and has recommended extension of the coverage of the act to the self-employed.

The proposed regulation will predetermine the bounds of that class, or confront the Congress with the undesirable alternative of another change in the status of the persons whose position is affected by the proposed regulation.

As recently as 18 months ago the Federal Security Agency, recognizing that any change in the definition of employee was the exclusive prerogative of the Congress, made the following recommendation in its report to the Congress:

Employer-employee relationship.— * * * It is important that contributors and administrative agencies know as precisely as possible what services and what wage payments are subject to contributions.

It would be desirable that the word "employee" be defined by statute so as to include all service relationships that fall short of being independent businesses. A statutory definition, amplified by suitable regulations, should provide a greater measure of certainty than even the most liberal judicial interpretation—as great a measure as can be attained in dealing with relationships so diverse as those under which one person performs service for another. If self-employment is covered, such a statutory test of the employment relation would afford a dividing line between the two modes of coverage that would be realistic and would be understandable by the man in the street. If self-employment continues to be excluded, it would limit the exclusion to persons who, in a substantial sense, are in business for themselves (Annual Report, Federal Security Agency, 1946, p. 453).

PRACTICAL EFFECTS OF THE PROPOSED REGULATION

1. Compliance difficulties

Persons having no right of direction or control over "employees" constituted such by the proposed regulation would nevertheless have to assume the responsibilities imposed by the act for accurate records showing the amount and time within which the services were performed and specifying exactly the remuneration received by such "employees." Reports on the withholding tax would have to be made and filed with the Bureau of Internal Revenue by such persons with respect to such "employees." Timely tax remittances, and supply of other information would be required.

In instances of failure to comply with the procedures of the law and regulations, persons assigned the status of "employers" by the proposed regulation—but having no right and no practical means to direct or control those who, under the new concept, would become their "employees"—would nevertheless be subject to the penalties that apply to employers generally, including delinquency assessments and civil and criminal penalties, the latter involving imprisonment for felony.

The following excerpt from testimony at the hearings relating to door-to-door salespersons points up some realities which make the proposed regulation unfeasible:

We are at a loss to know how it would be within our power—no matter what expense we might be willing to undergo—to obtain accurate records on 12,000 or more individual salespeople, because we have no way of knowing what any individual receives from the sale of our hosiery.

We do not know whether she raises or lowers the suggested commission, or whether she waives the commission entirely. We have no right to compel salespeople to report to us, nor any way to check the accuracy of such reports if * * * made.

A considerable percentage of our salespeople would have difficulty in preparing a properly informative report.

If a salesperson carries lines other than ours, we have no way of knowing what portion of her business expenses are properly allocated to our line.

As a matter of fact, we seriously doubt the ability of the salesperson properly to make this allocation herself.

Our salesperson may choose to sell as many orders or as few orders as she pleases, or for which she has the disposition, time, or energy. She may suspend or resume her operations when and if she chooses * * *. There are many instances where * * * we are out of touch with her

for long periods of time.—Statement of Philip Adler, Jr., president, American Hosiery Mills, Indianapolis, Ind. (hearings, Finance Committee, p. 78).

The proposed regulation would shift to the newly and erroneously constituted "employers" the administrative difficulties which the Treasury Department advanced in opposing extension of coverage when the subject was considered in prior years.[22]

2. Interference with long-standing relationships

To sustain the obligations of an "employer," changes would be forced in long-standing relationships that are natural in their industrial environment and which are, as the Supreme Court observed in Silk, a part of the surroundings with a view to which the act was drawn. This is another way of saying that businesses long established and which have been built up by distribution of their products through relationships other than those of employer and employee would have to change their distribution systems so as to use those who truly are employees, or if this is not feasible, to go out of business. The alterations of these relationships will tend to import other liabilities under other unrelated laws.

3. Levy of the Federal unemployment tax

About 25 States have standards for inclusion in their unemployment insurance laws which, if applied, might embrace some or all of the activities which the proposed regulation would bring under the act. But according to testimony presented at hearings few, if any, of the persons who would be embraced by the proposed regulation are now covered under State unemployment insurance laws. In these circumstances the proposed regulation will serve to levy a Federal tax,[23] unrelated to the provision of Federal old-age and survivors insurance, exceeding the tax imposed for the latter purpose on both employer and employee combined—a tax imposed upon employers alone.

4. Increased litigation and appeals for legislation

The uncertainty of the proposed regulation and the seriousness of its effects will burden the courts with increased litigation and the Congress with the task of enacting new legislation to allay the impacts of something invalid and unnecessary to begin with.

DISSIPATION OF THE TRUST FUND

It is a cardinal principle of the act that its benefits are paid, not as charity, but as a matter of right to persons who have contributed what the law requires toward the receipt of those benefits. Persons who are not "employees" in the ordinary sense of the term, who therefore have not paid taxes under the act, should not, in principle, share the benefits with those who are covered by the act and who have contributed the funds from which the benefits are paid.

The past practices of the Federal Security Agency and the proposed

[22] Economic Security Act, Hearings, House of Representatives, 1935, pp. 901-904, 911; Social Security Act amendments of 1939, Hearings, House of Representatives, p. 2112.

[23] Under the Federal Unemployment Tax Act, sec. 1607(i), Internal Revenue Code.

Treasury regulation thus take on added significance. An important question is raised whether the integrity of the social-security system is being maintained.

The proposed regulation would subject the persons brought under the act to the social-security tax appropriated to the Federal old-age and survivors trust fund only on wages paid on and after January 1, 1948. On the other hand, the proposed regulation would give these newly covered persons social-security coverage dating back to 1944 and, in an uncertain number of cases, beyond.

In a letter by the Acting Secretary of the Treasury Department, dated January 30, 1948, to the chairman of the Committee on Ways and Means of the House of Representatives, it is estimated the employers' and employees' taxes which would be collected by the force of the new regulation would be "close to $25,000,000 annually." [24]

It is an actuarial certainty that social-security taxes at current rates represent less than the value of annuities and insurance benefits to which the taxes are appropriated. Accordingly the proposed retroactive grant of coverage, without any offsetting contribution of taxes, represents a potential donation of more than $100,000,000 from the funds in the Federal old-age and survivors insurance trust fund which have been accumulated for the payment of benefits to persons who have contributed to the fund.

What is proposed has already occurred, although to a lesser extent. The Federal Security Agency for some time past has established wage credits and paid benefits to persons from whom the Treasury Department has consistently refused to collect social-security taxes on the grounds they were not covered by the act.

For example your committee is advised of one case in which persons having selling relations with more than 200 companies received letter determinations from the Federal Security Agency granting them coverage under the act, although the Treasury Department has consistently refused to collect social-security taxes.

The number of persons who have received benefit payments without contribution of taxes, according to information furnished by the Federal Security Agency to your committee, is at least 5,000. The amount paid out to these persons has not been specified.

Thus what has been done, and what it is proposed to do by the new regulation, poses serious questions whether the trust fund to which the more than 33,000,000 persons now insured under the act look for the payment of their benefits is being preserved for the purposes to which it is dedicated.

The pertintent provisions of law establishing the trust fund are as follows:

FEDERAL OLD-AGE AND SURVIVORS' INSURANCE TRUST FUND

SEC. 201. (a) There is hereby created on the books of the Treasury of the United States a trust fund to be known as the "Federal Old-Age and Survivors' Insurance Trust Fund" (hereinafter in this title called the

[24] Under the Federal Insurance Contributions Act alone. Unmentioned is the $37,500,000 in taxes which would be collected annually from employers under the Federal Unemployment Tax Act, in addition to their half-share of the above-mentioned $25,000,000. The $37,500,000 might become subject to off-set by contributions under State unemployment compensation laws, but this is speculative.

"Trust Fund"). The Trust Fund shall consist of the securities held by the Secretary of the Treasury for the Old-Age Reserve Account and the amount standing to the credit of the Old-Age Reserve Account on the books of the Treasury on January 1, 1940, * * * and, in addition, such amounts as may be appropriated to the Trust Fund as hereinafter provided. There is hereby appropriated to the Trust Fund for the fiscal year ending June 30, 1941, and for each fiscal year thereafter, out of any moneys in the Treasury not otherwise appropriated, amounts equivalent to 100 per centum of the taxes (including interest, penalties, and additions to the taxes) received under the Federal Insurance Contributions Act and covered into the Treasury. There is also authorized to be appropriated to the Trust Fund such additional sums as may be required to finance the benefits and payments provided under this title.

(b) There is hereby created a body to be known as the Board of Trustees of the Federal Old-Age and Survivors' Insurance Trust Fund (hereafter in this title called the "Board of Trustees") which Board of Trustees shall be composed of the Secretary of the Treasury, the Secretary of Labor, and the Federal Security Administrator, all ex officio. * * * It shall be the duty of the Board of Trustees to—

(1) Hold the Trust Fund * * *.

* * * * * * * * * * * * *

(f) The Managing Trustee is directed to pay from the Trust Fund into the Treasury * * * (expenses) * * * for the administration of Title II and Title VIII of this Act, and the Federal Insurance Contributions Act.

* * * * * * * * * * * * *

(g) All amounts credited to the Trust Fund shall be available for making payments required under this title.

The above provisions were introduced into the law in 1939 excepting the last sentence of section 201 (a) which was added by the Revenue Act of 1943.

When the act was adopted in 1935, constitutional doubts dictated the separation of the benefit and tax titles, without allocation of the revenues from social-security taxes to the payment of the benefits provided by the act. The Supreme Court, in Helvering v. Davis (301 U.S. 619, 640–45 (1937)), which decided the constitutionality of the old-age insurance provisions of the Social Security Act, sanctioned appropriation of the special tax imposed by the act to finance the provided benefits. This was followed in the action of the Congress in amending the act to make the appropriation provided by section 201 (a) set out above.

Your committee described the 1939 amendment as follows:

Section 201: This section creates a Federal old-age and survivors' insurance trust fund in place of the present old-age reserve account, which is abolished by these amendments. * * * Amounts equivalent to 100 percent of the taxes received under the Federal Insurance Contributions Act (formerly title VIII of the Social Security Act) are permanently appropriated to the trust fund, and old-age and survivors' insurance benefits will be paid out of the fund. This should clarify the relationship between contributions under the social-security program in the form of taxes and the source of benefit payments (S.Rept. 734, 76th Cong., 1st sess., p. 41).

The Federal Security Agency recognized the intended correlation of benefits and taxes in its report to the Congress dated November 1, 1940:

The coverage provisions of the old-age insurance benefit title of the Social Security Act and of the Federal Insurance Contributions Act are identical in terms. Procedures in uniform application of those provisions by the Board and the Bureau of Internal Revenue had previously been in-

augurated but an intensified effort has been made during the year to implement these procedures and to adapt them to new interpretations necessitated by amendments to the act as well as to new cases arising under original or unchanged coverage provisions.

In this effort the Board has maintained that the benefit and tax provisions were intended by Congress to be, and have been generally accepted by the public as being one contributary social insurance program rather than separate benefit and tax programs, and that the legislative objective of a single coordinated program must be borne in mind in approaching all administrative problems involving coverage of this program, notwithstanding the vesting of administrative jurisdiction in two separate agencies of the Federal Government (Fifth annual Report of the Social Security Board (1940), p. 42).

In successive annual reports, through its report for the fiscal year 1946, the Agency referred to the coordinate responsibilities of the two Departments charged with administration of the act, and to the importance of resolving conflicting viewpoints respecting coverage.

Therefore, it is difficult to reconcile the conflicting actions of the Agency in granting wage credits and disbursing benefits when the Treasury Department, proceeding under identical definitions and under interpretative regulations phrased in the same words, had ruled in the same situations that the services performed were not employment under the coverage of the act.

The case, it should be emphasized, is not that where, because of mistake of law or evasion on the part of the employer, persons within the definitions of the act are paid benefits although social-security taxes have not been paid with respect to the wage credits on which the benefits are based. These are risks which are distributed over the covered group in consonance with the ordinary principles of group insurance, and the spread of these risks is in the mutual benefit.

The case is, rather, that persons outside the group which has contributed to the old-age and survivors' insurance trust fund have been paid benefits out of the fund by the action of one administrative agency, while the other administrative agency has ruled they were not within the coverage of the act and had neither the obligation nor the privilege of contributing to the fund.

APPENDIX "C"

U. S. Department of Health, Education, And Welfare, Social Security Administration: Social Security Handbook—SS1-135 February, 1969, Chapter 11—

§ 1101. A "trade or business" for social security purposes means the same as when used in § 162 of the Internal Revenue Code of 1954, relating to income taxes. However, certain occupations and the self-employed activities of the members of certain religious sects who have been granted exemptions from the self-employment tax are not included in the term "trade or business" for social security coverage purposes, or are included only if certain conditions are met.

"Trade or business" is not specifically defined in § 162 of the Internal Revenue Code. However, certain guides for deciding whether a trade or business exists have been set forth in court decisions and Internal Revenue Service rulings. Briefly stated, these guides are:

A. The activity is started and carried on in good faith with the intention of making a profit or producing income.

B. The activity has been regularly carried on; that is, there has been a continuity of operation, a continual repetition of transactions, or a regularity of activities.

C. The activity is the person's regular occupation or calling which he carries on to make a living or profit.

D. The person holds himself out to the public as being engaged in the selling of goods and/or services.

Any one of these factors standing alone is not enough to show that a trade or business exists. On the other hand, not all the factors need be present.

In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 63

UNITED STATES OF AMERICA, PETITIONER

v.

W. M. WEBB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondents assert (Resp. Br. 21) that "The fishermen, under the decisions below, obviously qualify as self-employed persons under SECA [the Self-Employment Contributions Act of 1954, Section 1401 *et seq.* of the Internal Revenue Code]." Neither the district court nor the court of appeals addressed itself to this question, and there is no theory under which the crewmen (as opposed to the captains) could be considered independent contractors for SECA purposes—they are no more entrepreneurs than are sales clerks in a department store.

The problem of administration under the social security laws to which we referred in our petition

(Pet. 15–16) thus cannot be dismissed as simply one of shifting a tax burden (Resp. Br. 21–22, 44). Respondents view the question of the crewmen's status under the SECA as one to be resolved separately by a jury in each case. It is obvious, however, that such a system would not work, and cannot have been contemplated by Congress. The only practical way to handle this situation is the way the parties did handle it. The only ones who took in money were the owners. They paid the captains and the crews. They withheld federal income tax and paid it to the government. They withheld F.I.C.A. tax and paid it to the government. It is unrealistic to say that this should have been done by the captains. It is fanciful to say that the crewmen should have made their own payments and treated themselves as self-employed. It is unwarranted to say that the statute should be construed to say that Congress intended these questions to be passed upon by a jury or other fact finder in each case, long after the event, with no one knowing in the meantime what his responsibilities were or where he stood.[1]

On the contrary, here it is obvious that all parties at all times regarded the owners as the financially responsible parties. They owned the boats; they kept them in repair; they provided the fuel; they took out insur-

[1] That the ultimate question presented here is one of mixed fact and law does not prevent review on appeal which would insure uniform treatment of all fishermen. As the Fifth Circuit recently observed, "Obeisance to the clearly erroneous rule must yield when the facts are undisputed and we are called upon to reason and interpret." *United States* v. *Winthrop*, 69–2 CCH Tax Cases, par. 9686, pp. 85,884, 85,887.

ance; they bore the risk of loss; they set the pay scales;[2] they paid the bills; they paid the captains and the crews; they withheld income tax and paid Social Security tax. They were in charge. The parties understood and accepted that, and that should be enough to dispose of this case.

2. Congress' unexplained failure (Pet. 16, n. 5) to adopt the Treasury's 1967 proposal, which would have expressly included captains and crewmen of commercial fishing vessels in the definition of "employee" in Section 3121(d) of the Code, does not aid respondents, as alleged (Resp. Br. 44–46). Under that proposal, the captains and crewmen would have been treated as employees "* * * irrespective of the common law status of these persons." S. Rep. No. 744, 90th Cong., 1st Sess., p. 320. But our position here is not that "these persons" be treated as employees even though they do not qualify as such under the traditional test, but rather that their common law status is that of employees. Furthermore, the deletion of the Treasury proposal in the Conference Committee cannot be interpreted as resolving the problem presented in the instant case, since it followed both the decision of the district court below and the earlier holdings to the contrary of the Court of Claims and the First Circuit in *Cape Shore Fish Co.* v. *United States,* 330 F. 2d 961; *Kirkconnell* v. *United States,* 347 F. 2d 260; and *Capital Trawlers, Inc.* v. *United States,* 324 F. 2d

[2] "Prior to commencement of a new season, the taxpayers would furnish the captain with the pay scale of crew members and the crew size to be employed for the season. If a bonus was to be paid for fishing the entire season, this information also was furnished the captains." (R. 323, Finding 22.)

506, affirming *per curiam*, 216 F. Supp. 440 (D. Me.). As we noted in our petition (Pet. 16, n. 5), Congress' failure to act thus may as logically be interpreted as approving the decisions of the Court of Claims and the First Circuit as expressing a conclusion to the contrary. Or, the conferees for the Senate may have yielded on this amendment in the belief that it was not necessary, and with the thought that they could thus readily use it in exchange for some concession on another matter by the conferees for the House.[3]

The most that is shown is that Congress, for whatever reasons, concluded not to change the situation as it then stood. This does not show that the captains and crews were not employees of the owners under the law as it had been enacted in 1948. In any event, legislation enacted in 1967 would not have affected this case which involves the years 1956 and 1957, long before this abortive consideration of the question by Congress.

3. That respondents themselves thought that the captains and crewmen were employees rather than independent contractors is evidenced by the payroll records that were maintained for these individuals. Samples of these records were introduced into evi-

[3] Cf. *United States* v. *Price*, 361 U.S. 304, 310–311, 312: "Such nonaction by Congress affords the most dubious foundation for drawing positive inferences. * * * Whether Congress thought the proposal unwise, as respondent argues, or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of Congress to act."

See also *United States* v. *Wise*, 370 U.S. 405, 411.

dence in connection with the testimony of Jack T. Styron (R. 68–146). Defendant's Exhibit 1, Appendix, *infra*, pp. 7–8, is the type of summary sheet used in the preparation of respondents' bi-weekly payrolls (R. 129). Defendant's Exhibit 2, Appendix, *infra*, pp. 9–10, is a sample "individual pay roll record" (R. 297, 298) of a crew member, which was prepared from the basic data shown in the bi-weekly summary sheets (R. 129).

Records such as these show clearly enough that the owners were the entrepreneurs here. They were the managers; they handled the money, all of it. They paid the bills; they filed the tax returns. Moreover, they were the ones who were in the position to do this; and it was expected of them by all concerned.

Such records and payments are not necessary when a taxpayer retains the services of an independent contractor. There is no need to have a "payroll" for self-employed persons or to withhold federal income taxes from payments made to such persons. See Section 3401 *et seq.* of the Internal Revenue Code. Nor is there a need to obtain from an independent contractor a W–4 form showing the number of exemptions claimed by the individual for withholding tax purposes. See Section 3402(f)(2). Respondents nevertheless maintained these detailed payroll records, withheld federal income taxes and insisted that the captains and crew furnish properly completed W–4 forms each year (R. 188,

225–226, 250),[4] as required by law in the case of employees. See Section 3402(f)(2). In short, respondents treated the captains and crewmen as employees and not as independent contractors.

CONCLUSION

For the foregoing reasons, and for those expressed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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JOHNNIE M. WALTERS,
Assistant Attorney General.
MATTHEW J. ZINN,
Assistant to the Solicitor General.
ROBERT I. WAXMAN,
Attorney.

NOVEMBER 1969.

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[4] Deposition (R. 250) of Larney Arling Johnson (question by Mr. Waters, counsel for the government):

"Q. Before the season started, did you have all your crew members fill out the withholding statements and social security tax forms, etc.?

A. Yes sir, I had orders that those men would have to fill that out before they received their first pay check.

Q. Otherwise, they couldn't get paid the first time until they turned in that information?

A. That's right."

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APPENDIX

Defendant's Exhibit 1

8-24-66

PAUL W. WILLIAMS

[Reporter]

Plaintiff

Name	Check No.	Hours	Week of Hours	Rate	Payment	Fed. Tax	St. Tax	Fund	Attorney	Other	Balance	
Sylvester Willis	2644	44	14.22	3.0	158	99	1.89	13.17	2.06	115.00		2.58	00
Deacious Snipes	65	8	11.92	3.0	269	36	5.39	33.76	2.05		6.00	243	96
James Bridgeman	66	7	11.92	3.0	2.27	26	4.86	8.20	2.05		1.79	191	66
James Collins	67	8	11.92	3.0	253	50	5.07	32.46	2.05		5.00	190	28
Alonzo Bell	68	4	15.92	3.0	181	90	3.64	11.30	2.05		5.00	137	91
Curtis Owens	69	6	11.92	3.0	167	50	3.35	3.20	2.05		30.26	120	72
Edward Gilbert	70	10	11.92	3.0	167	50	3.35	—	2.05		5.00	138	18
Eddie Osborne	71	4	14.22	3.0	158	90	2.78	6.80	2.05		31.00	100	71
Matthew Anderson	72	3	14.22	3.0	137	90	2.78	11.00	2.05		5.00	99	11
Howard Ford	73	2	14.22	3.0	138	90	2.78	15.60	2.05		5.00	94	61
George Tompkins	74	6	11.92	3.0	167	50	3.43	—	2.05		13.00	114	18
Earl Guillory	75	1	11.92	3.0	138	90	2.78	20.20	2.05		6.00	89	91
Thomas Watson	76	5	15.38	3.0	138	90	2.78	1.80	2.05		10.00	103	31
Samuel Tuttle	77	2	14.22	3.5	131	70	2.64	9.60	2.05		5.00	93	49
Henry Thomas	78	5	15.38	3.5	131	70	2.64	.30	2.05		5.00	102	79
Willie Mack	79	6	11.92	3.5	131	70	2.64	—	2.05		5.00	103	09
Isaac Davis	80	2	14.22	3.5	131	70	2.64	18.20	2.05		5.00	88	89
Willie Wilson	81	2	1001	3.5	94	50	1.82	7.10	10.50			71	42
James Lair	82	2	12.09	3.5	110	60	2.21	10.70	2.05		20.00	56	64
Willie Batson	83	6	11.92	3.5	131	70	2.64	—	2.05		5.00	103	09
Joseph Weston	2684	2	14.22	3.5	131	70	2.64	11.20	2.05		5.00	88	87
TOTALS					3597	17	0304	24403	4214	115.00	139.05	2545	74

Defendant's Exhibit 1—Continued

Sheet #2

UNIT: Sea Raider PERIOD: 1432 NOS 289.5 Bi-weekly ENDING May 25 19 67

PAYROLL $ 4145.64 DISTRIBUTION

NAME	Check No.	Class	Fish or Hours	Rate	Payment		S.S. Tax	W. Tax	Food	Advance	Other	Balance	
					2557	17	63.04	264.93	43.44	115.00	139.05	2545	74
Charles Dumas		4	822	9.5	73	83	1.48	--	10.50	16.09	45.76	—	—
Joe Waters	2685	5	1119	9.5	102	15	2.04	--	18.00		5.00	77	01
Eunice Davis	86	2	1432	9.5	131	78	2.64	14.20	21.05		45.20	48	69
Louis Andrews	87	2	1192	9.5	109	98	2.18	10.40	19.50		5.00	71	90
Charles LeBlanc	88	3	1192	9.5	108	78	2.18	5.80	11.05		31.00	48	95
Joe Taylor	2689	3	357	.17	60	69	1.22	--	6.00			53	47
TOTALS-					4145	48	74.78	295.33	527.51	131.09	271.01	2845	76
Cooperative Market (Food)	2690											527	61
Lafayette Facility	2691											192	76
George Lyon Market	2692											25	40
Cecil's Bank	2693											51	00
Cameron Drug Store	2694											1	79
TOTALS													

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D.C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 63.—OCTOBER TERM, 1969

United States, Petitioner, v. W. M. Webb, Inc., et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 3, 1970]

MR. JUSTICE HARLAN delivered the opinion of the Court.

The respondents in these consolidated cases own boats that are used in commercial fishing in the Atlantic Ocean and the Gulf of Mexico. Their fishing is carried out through contractual arrangements, shaped by established custom, with boat captains, who man the boats and manage their day-to-day operation. The question before the Court is whether the captains and crewmen of the boats are the "employees" of the respondents within the provisions of the Federal Insurance Contributions Act (FICA)[1] and the Federal Unemployment Tax Act (FUTA),[2] which impose taxes on employers to finance government benefits for employees.

I

During the taxable periods involved here,[3] the respondents' vessels were engaged in fishing for menhaden, a nonedible fish that is processed and used for various

[1] 26 U. S. C. § 3100 *et seq.*

[2] 26 U. S. C. § 3300 *et seq.*

[3] The District Court found that the periods were, for different respondents, January 1, 1956, through December 31, 1956, and July 1, 1957, through December 1, 1958.

industrial purposes. The owner of each vessel equipped the vessel and secured the services of an experienced fisherman to be captain. The captain then assembled a crew. The captain customarily served on the same vessel for a full season, and occasionally for several consecutive seasons, although the oral arrangements between owners and captains permitted either to terminate the relationship at the end of any fishing trip. The fishing trips lasted from one to several days.

The vessels were operated from docking facilities owned by fish processing plants, and discharged their catch at these plants upon the completion of each trip. The plants paid respondents for the fish according to the volume of the catch, and respondents paid the captains and crews on the same basis, following terms that had been negotiated in advance. Neither captains nor crews were guaranteed any earnings if they failed to catch fish. While respondents determined the plant to which the vessels would report and generally where and when the fishing would take place, the captains managed the details of the operation of the boats and the manner of fishing.

Respondents filed tax returns as employers under the FICA and the FUTA, and paid the employer's share of the taxes due on the earnings of the captains and crews. After making the appropriate claims for refunds, they sued for refunds in the District Court for the Eastern District of Louisiana. The District Court, sitting without a jury, determined after trial that the captains and crews were not respondents' employees for the purposes of these tax statutes. The trial court noted that both the FICA and the FUTA define "employee" as any individual who has employee status under "the usual common law rules" applicable to a determination of the master-servant relationship. It found "without merit"

the Government's contention "that the common law governing the relationship of the taxpayer and the fishermen in pursuing fishing ventures in the Gulf of Mexico and the Atlantic Ocean is the general maritime law." 271 F. Supp. 249, 257 (1967). The court found further that the degree of control exercised by respondents over these fishing activities was not sufficient, under the common-law standards governing land-based occupations, to create the relationship of employer and employee between respondents and the captains and crews. Respondents were thus entitled to their refunds.

On appeal, the Court of Appeals for the Fifth Circuit affirmed. It reviewed the facts and observed that "it is clear that under maritime law the captain is the agent of the owner . . . and the crew hands are employees," and that "[i]f we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court." 402 F. 2d 956, 959 (1968).[4] However, the Court of Appeals agreed with the District Court that the statutes' prescription of "common law rules" barred application of maritime standards.

This conclusion conflicts with the approach of the Court of Claims in *Cape Shore Fish Co.* v. *United States*, 330 F. 2d 961 (1964). In that decision, the court found scallop fishermen, operating under arrangements similar to those here, to be employees of the shipowner for the purposes of these statutes. It reached this conclusion by applying to the facts the standards of maritime law. We granted certiorari in this case, 394 U. S. 996 (1969), to resolve this conflict, and to clarify the application to maritime workers of these important federal statutes.

[4] We are not called upon to, and do not, intimate any view on the correctness of the Court of Appeals' statement on this score.

II

The parties agree that both the FICA and the FUTA impose taxes on employers measured by the compensation paid to employees, and that in terms of these cases the two statutes define "employee" identically. In the FICA "employee" is defined to include "any individual, who under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee," and the language of the FUTA is to the same effect.[5] These definitions were not included in the original Social Security Act as it was adopted in 1935, which defined "employee" merely by specifying that it "includes an officer of a corporation," [6] but were added by amendment in 1948. We must consider the events that prompted the amendment.

In 1935 the draftsmen of the Social Security Act apparently thought it unnecessary to elucidate the meaning

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[5] The definitions provide:

"For the purposes of [the FICA], the term 'employee' means—(1) any officer of a corporation; or (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or (3) [any member of several specific occupations, not including fishing, when certain conditions are satisfied]." 26 U. S. C. § 3121 (d).

"For purposes of [the FUTA], the term 'employee' includes an officer of a corporation, but such term does not include—(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules." 26 U. S. C. § 3306 (i).

[6] Social Security Act § 1101 (a)(6), 49 Stat. 620, 647. The language of § 1101 (a)(6) was carried over to §§ 1426 (c) and 1607 (h) of the Internal Revenue Code of 1939, the predecessors of present §§ 3121 (d) and 3306 (i) of Title 26, respectively. See 53 Stat. 1, 178, 188.

of "employee" because they assumed that the term, as it was applied to varying factual situations, would be given the "usual" meaning it bore at common law. See S. Rep. No. 1255, 80th Cong., 2d Sess., 3–4 (1948). However, over the years of applying the Act to a myriad of work relationships, the lower federal courts developed somewhat varying approaches, certain courts relying more heavily on common-law precedents and others attempting to discern a special meaning for the term from the purposes of the legislation.[7] In addition, the courts tended to look to local precedents to determine the common-law standards, producing different results for similar factual situations in various parts of the country.[8] This divergence of views led this Court, in 1947, to render two decisions in an attempt to clarify the governing standards. *United States* v. *Silk*, 331 U. S. 704 (1947); *Bartels* v. *Birmingham*, 332 U. S. 126 (1947).

In *Silk*, the Court upheld the lower courts' determination that certain truck drivers were, under the circumstances, independent contractors rather than employees, but it upset a similar ruling with respect to a group of men who unloaded coal from railroad cars. In *Bartels* the Court, reversing the Court of Appeals, held that the members of certain dance bands were not employees of

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[7] Compare, *e. g.*, *Jones* v. *Goodson*, 121 F. 2d 176 (C. A. 10th Cir. 1941); *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715 (C. A. 2d Cir. 1943); *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (C. A. 6th Cir. 1944); *McGowan* v. *Lazeroff*, 148 F. 2d 512 (C. A. 2d Cir. 1945); *United States* v. *Wholesale Oil Co.*, 154 F. 2d 745 (C. A. 10th Cir. 1946), with *United States* v. *Vogue*, 145 F. 2d 609 (C. A. 4th Cir. 1944); *United States* v. *Aberdeen Aerie*, 148 F. 2d 655 (C. A. 9th Cir. 1945); *Grace* v. *Magruder*, 148 F. 2d 679 (C. A. D. C. Cir. 1945).

[8] See S. Rep. No. 1255, *supra*, at 6.

the owners of the dance halls at which they were engaged, despite contractual provisions characterizing them as employees. While the Court's opinions in these cases stressed many of the factors that had been important in common-law determinations of employee status, they also contained language that could be read to detach the question of statutory coverage from the common-law tests.[9] The Court stated, in *Bartels*, that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." 332 U. S., at 130.

Acting upon this language, the executive agencies set about replacing their original regulation, which had defined the employment relation in terms of the incidents

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[9] In *Silk*, the Court said:

"As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. . . .

". . . When [the problem of differentiating between employee and independent contractor] arose in the administration of the National Labor Relations Act, we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was 'some simple, uniform and easily applicable test.' The word 'employee,' we said, was not there used as a word of art, and its content in its context was a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.' We concluded that, since that end was the elimination of labor disputes and industrial strife, 'employees' included workers who were such as a matter of economic reality. . . . We rejected the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants.' . . . *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 120, 123, 124, 128, 129, 131.

"Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case." 331 U. S., at 713–714.

of employment at common law,[10] with a new regulation that would embody the test of "economic reality." [11] However, the proposed new regulation never took effect. Within two months of its announcement, a resolution was introduced in both the House of Representatives and the Senate calling for "a reassertion of congressional intent regarding the application of the Act." S. Rep. No. 1255, *supra*, at 7. This resolution, which was finally passed over the President's veto, added to the statutes the present definitions of "employee." [12]

The report of the Senate Finance Committee on the resolution makes clear a congressional purpose to disapprove the proposed regulation and to reaffirm that determinations of employee status were to be based on the traditional legal tests. The Committee seems to have thought that the *Silk* and *Bartels* decisions had applied traditional common-law standards, despite the language in the opinions suggesting a less constrictive approach. However, noting that the Treasury Department claimed support in those decisions for its contemplated new departure, the Committee declared: "But if

[10] 1 Fed. Reg., Pt. 1, at 1764 (1936), promulgated November 9, 1936 (Treasury Department); 1 Fed. Reg., Pt. 1, at 1276 (1937), promulgated July 21, 1937 (Social Security Board).

[11] 12 Fed. Reg. 7966 (1947).

[12] H. J. Res. 296, Pub. L. No. 642, c. 468, 62 Stat. 438; see H. R. Doc. No. 711, 80th Cong., 2d Sess. (veto message of President Truman). This 1948 amendment put the definitions in both statutes in the negative form now found in 26 U. S. C. § 3306 (i), see n. 5, *supra*. The Social Security Act Amendments of 1950 restyled the predecessor of § 3121 (d), giving it the form now possessed by that provision, without changing the applicable principles except to extend coverage to specified classes of workers irrespective of their common-law status. C. 809, § 205, 64 Stat. 477, 536; see H. R. Rep. No. 2771, 81st Cong., 2d Sess., 104 (1950); cf. S. Rep. No. 1669, 81st Cong., 2d Sess., 17–18 (1950); H. R. Rep. No. 1300, 81st Cong., 1st Sess., 80–91, 189–207 (1949).

it be contended that the Supreme Court has invented new law for determining an 'employee' under the social-security system in those cases, then the purpose of this resolution is to reestablish the usual common-law rules, realistically applied." *Id.*, at 2.

The causes of congressional dissatisfaction with the proposed regulation were twofold. As a fiscal matter, the Committee cited testimony that the new regulation would extend social security benefits to between 500,000 and 750,000 new workers, who had not been covered previously and had not contributed to the trust fund from which benefits would be paid, thus endangering the integrity of the fund. More generally, the Committee was fearful of the uncertainty that would be created by the new regulation, and the discretion it would give to the executive agencies in determining the applicability of the statutes. The Report stated:

> "In a word, by unbounded and shifting criteria, [the proposed regulation] would confer in those administering the Social Security Act full discretion to include, or to exclude, from the coverage of the act any person whom they might decide to be, or might decide not to be, an 'employee'; and like discretion to fasten tax liabilities and the administrative duties and costs of compliance with the act upon any person whom they might decide to be an 'employer.'
>
> "The proposed regulation discards the common-law rules for distinguishing the employer-employee relationship distilled from many decisions by many courts out of many insights of real situations, for a new rule of nebulous character.
>
> "Under the proposed regulation an 'employee' is 'an individual in a service relationship who is dependent as a matter of economic reality upon the

> business to which he renders service and not upon his own business as an independent contractor.'
>
> "The rule, obviously, will not serve to make the necessary distinctions. Who, in this whole world engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person? . . .
>
> . . . . . .
>
> ". . . [T]he proposed regulation concerns itself mainly, as was stated to your committee by a witness at the hearings: '. . . with making it abundantly clear that on virtually no state of facts may anyone be certain whether or not he has a tax liability until the Commissioner has made up his mind about it.'" *Id.*, at 7, 10, 11.

The Committee stated that, in contrast to the proposed regulation, whose "basic principle . . . is a dimensionless and amorphous abstraction," the existing regulation was "not devoid of uncertainty, but its basis is in established standards of law which frame and limit its application." *Id.*, at 12. The conclusions stated in the House Report were similar. H. R. Rep. No. 1319, 80th Cong., 2d Sess. (1948).[13] By the resolution, Con-

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[13] In a report published just two weeks before the enactment of the resolution (commenting on H. R. 6777, a bill that contained the same amendment ultimately accomplished by the resolution), the House Committee on Ways and Means stated:

"Our failure to act may be further construed as conferring upon the administrative agencies and the courts an unbridled license to say, at will, whether an individual is an employeee or an independent contractor . . . .

". . . [T]he basic controlling factor is whether the policy of the Congress shall be to cover as employees only those who are employees under the common-law rule, or to cover a broader class of individuals under some nebulous hypothesis with no bounds to its application." H. R. Rep. No. 2168, 80th Cong., 2d Sess., 9 (1948).

gress unequivocally tied the coverage of these tax provisions to the body of decisional law defining the employer-employee relationship in various occupations.

In none of the discussions of the 1948 resolution was there any discussion of maritime employees. The respondents argue that, by failing to make specific provision for the application of maritime law to seagoing occupations, Congress impliedly decreed that those occupations should be gauged by the standards of the "common law" applicable to land-based activities. They rely in part on the fact that the phrase "common law" is sometimes used in contradistinction to the "maritime law" traditionally applied in courts of admiralty, and they also point to the fact that the Senate Report stressed the degree of the employer's control over the employee's work as central to the Committee's understanding of the common-law tests of employment. The Senate Report quoted with approval the then-existing regulation, substantially identical to the one now in effect,[14] which stated:

> "Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.
>
> "Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. . . ." S. Rep. No. 1255, *supra*, at 3.

[14] 26 CFR § 31.3121 (d)–(e).

Respondents argue that this language indicates a congressional intent that, where the maritime nature of a vocation makes impracticable the degree of control generally exercised by land-based employers over their employees, the land-based standards must nevertheless be applied, with the result that no "employment" exists for the purposes of those statutes.

III

We do not think Congress intended the anomalous result of having maritime activities subject to standards, for social security tax purposes, other than those that are relevant to seafaring enterprises. Such a result is not necessary to accomplish the dual concerns underlying the 1948 amendment. Application of maritime standards to determine the status of members of fishing ventures will not open brand new areas of social security coverage. To the contrary, the employee status of captains and crewmen engaged in fishing operations similar to these is supported by a Treasury Department interpretation, applying maritime standards, that was issued in 1940, immediately after maritime employees were first brought within the coverage of the Social Security Act by amendment in 1939. S. S. T. 387, 1940–1 Cum. Bull. 192; see Social Security Act Amendments of 1939, §§ 606, 614, c. 666, §§ 606, 614, 53 Stat. 1360, 1383, 1392, as amended, 26 U. S. C. §§ 3121 (b), 3306 (c). This ruling, which the Social Security Administration has accepted for purposes of paying benefits to claimants, had existed for eight years before Congress added the present definitions of "employee" to the statutes. It was not mentioned at the time of the 1948 amendment. Since the ruling represented the accepted view of both the taxing and paying agencies, Congress could have had no concern that payment of benefits to

maritime employees would constitute an uncompensated drain on the social security fund.[15]

More important, the chief concern behind the 1948 amendment—avoiding the uncertainty of the proposed "economic reality" test—is wholly satisfied if seafaring work relationships are tested against the standards of maritime, rather than land-based, decisional law. Congress' fearfulness of the "nebulous" nature of the proposed regulation indicates that it used the phrase "usual common law rules" in a generic sense, to mean the standards developed by the courts through years of adjudication, rather than in a technical sense to mean those standards developed by "common law" courts as opposed to courts of admiralty. Maritime law, the common law of seafaring men, provides an established network of rules and distinctions that are practically suited to the necessities of the sea, just as land-based decisional law provides a body of rules adapted to the various forms of domestic employment. The goal of minimizing uncertainty can be accomplished, in the maritime field, by resort to the "usual" rules of maritime jurisprudence.[16]

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[15] Subsequent amendments to the social security laws make it now even clearer that classification of some maritime workers as employees will not threaten the social security fund. The Social Security Act Amendments of 1950 extended benefits coverage to the self-employed for the first time. C. 809, 64 Stat. 477, 502, 540; see H. R. Rep. No. 1300, 81st Cong., 1st Sess., 9–10 (1949). Benefits for the self-employed are financed by taxes paid by them under the Self-Employment Contributions Act, 26 U. S. C. § 1401 *et seq.*; see H. R. Rep. No. 1300, *supra*, at 135–145; S. Rep. No. 1669, 81st Cong., 2d Sess., 153–166 (1950). Therefore, the captains and crewmen are eligible for social security benefits whether they are considered employees or self-employed.

[16] A conclusion that maritime standards could not be applied might frustrate Congress' evident expectation that the FICA and FUTA legislation would apply to seamen, and specifically to fisher-

This conclusion is not weakened by the emphasis given, both in the Senate Report and in the regulation, to the factor of control. Control is probably the most important factor under maritime law,[17] just as it is under the tests of land-based employment. It may be true that, in most maritime relationships, the workers enjoy discretion that is unusually broad if measured by land-based standards—a discretion dictated by the seafaring nature of the activity. However, except where there is nearly total relinquishment of control through a bare-boat, or demise, charter, the owner may nevertheless be considered, under maritime law, to have sufficient control to be charged with the duties of an employer. See *e. g., The Norland,* 101 F. 2d 967 (C. A. 9th Cir. 1939; G. Gilmore & C. Black, The Law of Admiralty § 4–23 (1957). Congress' stress on the importance of control reflects the primacy of that factor in the rules governing the most common, land-based vocations,[18] which were certainly foremost in the congressional mind at the time of the 1948 amendment. It does not preclude the application, in different areas, of decisional rules that vary in the

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men. As noted above, the 1939 amendments extended the statutes to cover maritime employees. Additionally, 26 U. S. C. § 3121 (b)(4) provides an exemption for service by aliens on foreign vessels, and § 3306 (c)(17) exempts fishermen on vessels that do not exceed 10 tons in displacement. These provisions raise the inference that fishermen on larger vessels were expected to be covered, under the general "common law rules" provision. However, if shipowners were relieved of the employers' tax liabilities unless their relationship with the captains and crews were of the sort that would constitute an employer-employee relationship in a land-based activity, application of the statutes to fishermen might be seriously limited.

[17] See, *e. g., Cape Shore Fish Co.* v. *United States,* 330 F. 2d 961, 965–968 (Ct. Cl. 1964); G. Gilmore & C. Black, The Law of Admiralty § 4–21 (1957).

[18] See, *e. g., Radio City Music Hall Corp.* v. *United States,* 135 F. 2d 715, 717–718 (C. A. 2d Cir. 1943).

precise degree of control that is required. Cf. *Decey Products Co.* v. *Welch*, 124 F. 2d 592, 598–599 (C. A. 1st Cir. 1949); *McGuire* v. *United States*, 349 F. 2d 644 (C. A. 9th Cir. 1965).[19]

The guidelines in the regulation also allow for such flexibility, as is attested by the existence, for nearly 30 years, of the Treasury ruling, S. S. T. 387, confirming the employee status of fishermen such as those involved here. Now, as in 1948, the regulation proceeds, after the language already quoted, to elaborate some of the factors other than control that may be important:

> "The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services." 26 CFR 31.3121 (d)–1 (c)(2).[20]

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[19] See H. R. Rep. No. 2168, *supra*, n. 12, at 9, 10:

"Ample flexibility is possible under [the common-law] rule to accommodate peculiar or unusual employment relationships so frequently found in our complex economic system.

. . . . . .

"The common-law concept of master and servant, of course, is no more fixed and immutable than the common law itself. Hence it will produce in practice varying results under varying circumstances and in different jurisdictions. But such variations will not offend the common-law rule itself . . . .

". . . There is nothing to fear from differences in the application of the common-law tests, but there is much to fear from the abandonment of recognized common-law principles in resolving such questions of fact. Such abandonment would simply amount to reliance upon no recognized body of legal principles."

[20] Other factors that may have significance are discussed in *United States* v. *Silk*, 331 U. S. 704 (1947); *Enochs* v. *Williams Packing Co.*, 370 U. S. 1 (1962); *Kirkconnell* v. *United States*, 347 F. 2d 260 (Ct. Cl. 1965); *Illinois Tri-Seal Products, Inc.* v. *United States*, 353 F. 2d 216 (Ct. Cl. 1965).

It is clear that this brief sketch of relevant factors cannot be intended to provide a workable test, complete in itself, displacing the complex of common-law rules Congress so carefully tried to preserve. Rather, the regulation provides a summary of the principles of the common law, intended as an initial guide for the determination, required by the first sentence of the regulation, whether a relationship "is the legal relationship of employer and employee." The thrust of both statute and regulation is that the standards that are to govern in any field are those which the courts customarily apply to define this "legal relationship." [21]

We conclude that the Court of Appeals erred in declining to judge the status of the captains and crewmen against the standards of maritime law. Accordingly, the judgment is reversed, and the case is remanded to that court for proceedings consistent with this opinion.

It is so ordered.

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[21] We find no support for a contrary conclusion in the fact that, shortly after the District Court's decision in this case, the Treasury Department unsuccessfully sought an amendment to § 3121 (d) (3) defining "employee" to include the captains and crews of commercial fishing vessels without regard to their status under the general definition in § 3121 (d) (2), see n. 5, *supra*. See Social Security Amendments of 1967, H. R. 12080, §§ 504 (b) (1), (2) (as amended by the Senate); S. Rep. No. 744, 90th Cong., 1st Sess., 203–205, 320–324 (1967); H. R. Rep. No. 1030, 90th Cong., 1st Sess., 74 (1967) (Conference Report deleting the amendment). That the Treasury also chose to proceed on the legislative front does not impair the argument put forth by the United States here, and Congress' failure to adopt the amendment is a dubious indication of the position of Congress in 1967 on the question before us, let alone the position of a different Congress in 1948. Cf. *United States* v. *Price*, 361 U. S. 304, 310–312 (1960); *United States* v. *Wise*, 370 U. S. 405, 411 (1962).